

(16,641.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 144.

DARWIN C. ALLEN, PLAINTIFF IN ERROR,

vs.

THE SOUTHERN PACIFIC RAILROAD COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

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a In the Supreme Court of the State of California.

SOUTHERN PACIFIC RAILROAD Co., Respondent, }
 vs. } No. 15714.
 DARWIN C. ALLEN, Appellant.

Transcript on Appeal.

Rob't Harrison, attorney for appellant.
 Jos. D. Redding, attorney for respondent.

Filed this 19th day of April, A. D. 1894.

L. H. BROWN, Clerk,
 By P. V. LONG,
Deputy Clerk.

1 In the Supreme Court of the State of California.

In the Superior Court of the County of Tulare, State of California.

SOUTHERN PACIFIC RAILROAD Co., Plaintiff, }
 vs. }
 DARWIN C. ALLEN, Defendant.

The plaintiff, by Joseph D. Redding, its attorney, complains and alleges :

I.

The plaintiff is and was at all the times herein mentioned, a corporation duly organized and existing under and by the laws of the State of California.

2-15

II.

The plaintiff was on the 1st day of February, 1888, the owner and seized in fee of all of the following-described tracts of land, situate in the county of Tulare, State of California, and known and designated on the public surveys of the United States, as follows, to wit :

* * * * *

16

III.

That on the first day of February, 1888, the plaintiff and defendant entered into several contracts, in writing, numbered as follows :

17 Contract No. 9222 to and including contract No. 9305, by which the plaintiff agreed to sell to the defendant the above-described lands and premises.

IV.

That filed with this complaint and made a part hereof and now placed in the custody of the clerk of this court, as exhibits and marked Exhibit "A," in this cause, and to be introduced by the

plaintiff, as evidence in this cause, and to be kept by the clerk in said custody, until the final disposition of this suit, are the duplicate originals of said contracts entered into as aforesaid, duly signed by the parties thereto, namely, the plaintiff and the defendant; that in said contracts will be found each and all of the terms of said contracts specifically set forth.

V.

That on the 1st day of February, 1889, there became due and owing plaintiff, from said defendant, under the terms of said contracts, the sum of one thousand four hundred and forty-seven — (\$1,447.73) dollars for the second year's interest on the remainder of the purchase-money.

That said defendant has not paid the same nor any part thereof.

18 That on the 1st day of February, 1890, there became due and owing plaintiff, from said defendant, under the terms of said contracts, the sum of one thousand four hundred and forty-seven and $\frac{73}{100}$ ths (\$1,447.73) dollars, for the third year's interest on the remainder of the purchase-money.

The said defendant has not paid the same nor any part thereof.

That on the first day of February, 1891, there became due and owing plaintiff, from said defendant, under the terms of said contracts, the sum of one thousand four hundred and forty-seven and $\frac{73}{100}$ ths (\$1,447.73) dollars, for the fourth year's interest on the remainder of the purchase-money.

That said defendant has not paid the same nor any part thereof.

All of which will more specifically appear by a statement filed with this complaint and marked Exhibit "B," setting forth in detail the amounts due and unpaid, which statement is made a part of this complaint, and is to be used as an exhibit in said cause and to which reference is particularly made.

VI.

That said defendant has not paid said amounts nor any part thereof.

19

VII.

That on the 24th day of June, 1891, the plaintiff demanded payment from said defendant of the said several sums due; that said defendant on or about that day refused to pay the same and still refuses to pay the same. That said defendant entered into possession of said lands and premises and now continues in the possession thereof.

VIII.

That plaintiff is, and always has been, willing and ready to perform said agreements, in all their covenants and conditions, on its part to be kept and performed, upon full performance by defendant of the terms and conditions of said contracts and the said plaintiff has been ready at all times, and now is ready, after the re-

ceipt of the patent for said lands and premises, and upon demand, and the surrender of the several contracts, hereinabove referred to, to execute and deliver to the defendant, his heirs and assigns, grant, bargain and sale deeds of said premises.

Wherefore, plaintiff prays judgment that there is due from said defendant to the plaintiff under and by virtue of said contracts, the sum of four thousand three hundred and forty-three and 20 $\frac{19}{100}$ ths (\$4,343.19) dollars, the same being for the second, third and fourth years' interests on said contracts. That said defendant perform said agreements and pay to the plaintiff within thirty days from the date of decree herein, the amounts due to the plaintiff upon said contracts.

That in case said defendant fails to pay to plaintiff the amounts found due to plaintiff upon said contracts, as aforesaid, within said period of thirty days, from the entry of decree herein, then and from that time the defendant, and all persons holding said premises under said defendant shall be forever barred and foreclosed of all claim, right or interest in said lands and premises, under and by virtue of said agreements, and be forever barred and foreclosed of all right to a conveyance thereof, and that plaintiff be let into the possession of said premises, and that said contracts be declared null and void.

That plaintiff have such other or further relief as the court may deem just and equitable.

The plaintiff recover its costs herein.

JOSEPH D. REDDING,
Attorney for Plaintiff.

(Duly verified.)

Filed August 6, 1892.

21

Stipulation.

(Title of Court and Cause.)

It is hereby stipulated that there be omitted from the transcript on appeal herein, all of Exhibit "A" of plaintiff's complaint, save one, of the contracts in said exhibit contained: all of the eighty-four contracts of said exhibit being of same form and precisely alike, save as to description of the land and price thereof.

JOSEPH D. REDDING,
Attorney for Respondent.
ROBT HARRISON,
Attorney for Appellant.

San Francisco, March 13, 1894. Filed herewith.

EXHIBIT "A."

(Referred to in foregoing stipulation.)

SOUTHERN PACIFIC RAILROAD COMPANY,
LAND DEPARTMENT.

No. 9297.

This agreement, made at San Francisco, California, this first (1st) day of February, A. D. 1888, between the Southern Pacific Railroad Company, party of the first part, and Darwin C. Allen, of the city and county of San Francisco, State of California, party of the second part;

22 *Witnesseth:* That the party of the first part, in consideration of the covenants and agreements of the party of the second part hereinafter contained, agrees to sell to the party of the second part, the following tract of land situated in the county of Tulare, State of California, and known and designated on the public surveys of the United States as the west half of northeast quarter (W. $\frac{1}{2}$ of N. E. $\frac{1}{4}$) of section thirty-three (33), township twenty-three (23), south, range nineteen (19) east, Mount Diablo base and meridian, containing eighty (80) acres, for the sum of two hundred and eighty (\$280) dollars gold coin of the United States.

And the party of the second part, in consideration of the premises, agrees to buy the land hereinbefore described, and to pay to the party of the first part, the said sum of two hundred and eighty (\$280) dollars, as follows, to wit: Fifty-six (\$56) dollars, and also \$15.68, one year's interest in advance on the remainder, in United States gold coin of the present standard of value, on the execution of this contract (which two last-mentioned sums have this day been fully paid), and the remainder, to wit: the sum of two hundred and

23 twenty-four (\$224) dollars, with interest thereon, annually in advance, at the rate of seven per cent. per annum, both in United States gold coin *gold coin* of the present standard of value, at its office in the city and county of San Francisco, on or before the 1st day of February, 1893, and, also, to pay all taxes and assessments that may at any time be levied or imposed upon said premises, or any part thereof; and if the party of the second part shall fail to pay such taxes or assessments, or any part thereof, at any time when the same shall become due, then the said party of the first part may pay the same, and all sums so paid by the party of the first part shall be added to and become part of the unpaid remainder, and shall bear interest at the same rate, and be paid in the same manner and at the same time and place hereinbefore provided for the payment of said remainder and the interest thereon.

It is further agreed, that upon the punctual payment of said purchase-money, interest, taxes and assessments, and the strict and faithful performance by the party of the second part, his legal representatives or assigns, of all the agreements herein contained, the party of the first part will, after the receipt of a patent therefor from

24 the United States, upon demand and the surrender of this instrument, execute and deliver to the party of the second part, his heirs and assigns, a grant, bargain and sale deed of said premises, reserving all claim of the United States to the same as mineral land.

It is further agreed that until the full payment of said purchase-money, interest, taxes and assessments, no strip or waste shall be made on said premises, and that no wood or growing trees shall be cut thereon, except for necessary fuel for the family of the legal occupant under this contract, and for the erection of buildings or fences on said land, without the previous written consent of the party of the first part.

It is further agreed, that the party of the second part may at once enter upon, take and hold possession of said premises, provided, however, that if the party of the second part shall fail to make any of said payments of remainder or interest, taxes or assessments as herein provided, or shall fail to comply strictly with any of the stipulations of this contract, then this right shall cease, and the party of the first part, its successors or assigns, may, without notice, enter upon, take and hold possession of the said premises with all the improvements thereon.

25 It is further agreed, between the parties hereto, that the party of the first part claims all the tracts hereinbefore described, as part of a grant of lands to it by the Congress of the United States; that patent has not yet issued to it for said tracts; that it will use ordinary diligence to procure patents for them; that, as in consequence of circumstances beyond its control, it sometimes fails to obtain patent for lands that seem to be legally a portion of its said grant, therefore, nothing in this instrument shall be considered a guarantee, or assurance that that patent or title will be procured; that in case it be finally determined that patent shall not issue to said party of the first part for all, or any of the tracts herein described, it will, upon demand, repay (without interest), to the party of the second part, all moneys that may have been paid to it by him on account of any of such tracts as it shall fail to procure patent for, the amount of repayment to be calculated at the rate and price per acre, fixed at this date for such tracts by said party of the first part, as per schedule on page 3 hereof; that said lands being unpatented, the party of the first part does not guarantee the possession of them to the party of the second part, and will not be responsible to him for damages, or cost, in case of his failure to obtain and keep such possession.

26 It is further agreed, that if the party of the first part shall obtain patent for part of the lands herein described, and shall fail to obtain patent for the remainder of them, this contract shall, in all its provisions, be and remain in full force and virtue as to the tracts patented, and shall, except as to repayments herein provided for, be null and void as regards those tracts for which it shall be finally determined that patents cannot be obtained.

It is further agreed, that the party of the second part will never deny that the tracts herein described, or any part of them, are a

part of said grant, and will do no act to hinder, delay or impede the obtaining of patent for them by the party of the first part; and that he will not obtain or hold possession of all, or any of them adversely to said party of the first part.

It is further agreed, that this contract shall not be assignable, except by endorsement, and with the written consent of the party of the first part, and the written promise of the assignee to perform all the undertakings and promises of the party of the second part, as above set forth.

It is further agreed, that the party of the second part shall pay \$3.00 for the expenses of the acknowledgments to the deed that shall be issued on this contract.

27 In testimony whereof, the party of the first part has caused these presents to be signed in duplicate by its secretary and land agent, and the party of the second part has signed his name hereto.

JEROME MADDEN,
Land Agent S. P. R. R. Co.

J. L. WILLCUT,
Secretary S. P. R. R. Co.

DARWIN C. ALLEN. [SEAL.]

Endorsed : Unpatented lands No. 9297. Contract for a deed.

Answer and Cross-complaint.

(Title of Court and Cause.)

Darwin C. Allen, the defendant above named, answering the complaint of plaintiff in above-entitled action filed, on his information and belief,

I.

Denies that plaintiff, on the first day of February, 1888, or at any other time, was, or is, the owner or seized in fee of the several pieces of land in said complaint described, or of any, or either, or of any part of any or either of them.

28

II.

Defendant denies that he ever entered upon, or took possession, or is now, or ever was in possession of said pieces of land, or of any or either, or of any part of any or either of them.

And by way of cross-complaint, the said defendant alleges :

I.

That plaintiff is, and at all times herein mentioned, was a corporation as in said complaint alleged.

II.

That defendant entered into certain contracts with plaintiff in paragraph "III" of plaintiff's complaint, and as therein mentioned.

III.

That at the time of entering into said contract, the plaintiff represented to defendant that plaintiff was the owner and seized in fee of all the pieces of land in said complaint and said contracts described under a grant to it by the Congress of the United States, but had not yet received a patent therefor, and that defendant believed said representations and entered into said contracts
29 with plaintiff for the purchase from it of said pieces of land as in said complaint alleged, wholly and solely upon the basis of said representations and his belief of the truth thereof. Had defendant known or believed that said representations were false or untrue, he would not have entered into said contracts nor sought to purchase said lands, or any part of them, from plaintiff.

IV.

That as defendant is informed and believes, the plaintiff, at the time of entering into said contracts as aforesaid, was not the owner or seized in fee of said pieces of land, or of any or either, or of any part of any or either of them, under a grant from said Congress, or otherwise, and had not any right, title, or interest in said pieces of land, or in any or either, or in any part of any or either of them.

V.

That defendant never was given, took, or had possession, use or enjoyment of said lands, or of any part thereof, but was prevented from taking or holding possession of them, or of any part of them, by reason of plaintiff's lack of title to them as aforesaid. That defendant is ready and willing, and hereby offers to surrender
30 to plaintiff all claim, right or interest to or in said lands, and every part thereof, and to surrender all of said contracts and all interest in, and claim to them.

VI.

That at the time of the execution of said contracts, to wit: February 1, 1888, defendant paid plaintiff on account thereof, and as part of the purchase price of said lands in said contracts described, the sum of six thousand six hundred and eighteen and $\frac{25}{100}$ dollars in United States gold coin, no part of which sum has been returned to him.

VI.

That soon after the execution of said contracts as aforesaid, to wit: in May, 1888, defendant entered into a contract for the sale by him, and the purchase by the vendee, of all of said lands, for the price of fourteen thousand four hundred and eighty-eight dollars in excess of the price paid and to be paid plaintiff by defendant for said lands under the terms of the contracts set forth in said complaint, but that the vendee under said contract with defendant, upon the examination of the title to said lands, rescinded his said

31 contract and refused to purchase said lands, or any part of them, on the ground and for the reason that neither plaintiff nor defendant had any title to, or interest in, said lands, or any part of them. And defendant avers that neither plaintiff nor defendant then had any title to, or interest in, said lands, or any part thereof, and that by reason thereof, and of the false representations of plaintiff as to its title and claim to said lands as aforesaid, the defendant has been injured and damaged, to wit: in (1) the said sum of six thousand six hundred and eighteen and $\frac{2}{100}$ dollars in United States gold coin, with legal interest thereon from February 1, 1888, and (2) the sum of fourteen thousand four hundred and eighty-eight dollars.

Wherefore, defendant joins with plaintiff in praying that said contracts so rescinded, and sought to be rescinded by plaintiff in his said complaint, be declared null and void, and that defendant have judgment against the plaintiff for (1) the moneys paid plaintiff on account of said contracts, namely: the sum of six thousand six hundred and eighteen and $\frac{2}{100}$ dollars in United States gold coin, with interest thereon from February 1, 1888, at the rate of seven per cent. per annum; (2), the damages suffered by defendant by, and on account, of the false representations of plaintiff, as aforesaid, namely, the sum of fourteen thousand four hundred
32 and eighty-eight dollars, and (3) the costs of this action.

ROBT HARRISON,

Attorney for Defendant.

(Duly verified.)

Filed August 19, 1892.

Answer to Cross-complaint.

(Title of Court and Cause.)

Now comes the plaintiff in the above-entitled action and answers the cross-complaint of the defendant herein and for answer alleges:

The plaintiff denies that at the time of entering into said contracts, that it represented to the defendant that it, the said plaintiff, was the owner and seized in fee of said tract of land or any portion thereof, except as is set forth in and by the terms of the contracts themselves.

The plaintiff denies that at the time of entering into said contracts as aforesaid, it was not the owner or seized in fee of said pieces of land or of any or either of them, or of any part, or of any or either of them under a grant from said Congress or otherwise, but, on the contrary, plaintiff alleges that it was at said time the grantee
33 under the act of Congress of July 27th, 1866, as is set forth in the contracts themselves and made a part of the complaint on file herein and to which reference is particularly made and which are made part of this answer to the cross-complaint of the defendant.

The plaintiff denies that it had not, at said time, or at any time, any right, title or interest in said pieces of land, or of any, or either

of them, or of any part, or of any, or either of them, but, on the contrary, plaintiff alleges that it did have title at said time to each and all of the pieces of said land mentioned in said contract, in pursuance to the terms of said act of Congress, and in accordance with the stipulations contained in said contracts above enumerated.

The plaintiff denies that the defendant never was given, or took, or had possession, or the use, or the enjoyment of said lands, or any part thereof, and denies that the defendant was prevented from taking or holding possession of them, or any part of them, by reason of the defendant's lack of title to them, as aforesaid or in any way. On the contrary, plaintiff alleges that the defendant did take possession of all of said land and premises under the terms of said contracts, and has held possession of the same ever since, and has had possession up to the time of the commencement of this action, and still holds possession.

34 Plaintiff denies that any vendee, or the particular vendee, named by the defendant in his cross-complaint, rescinded any contract with the defendant, or refused to purchase the land and premises mentioned in this action, or any part of them, because the plaintiff had no title to the same.

The plaintiff denies that neither the plaintiff nor the defendant, then, had any title or interest in or to said lands, or any part thereof, and denies that by reason thereof, or by, or from the false representations of the plaintiff as to its title or claim to said lands, as aforesaid, the defendant has been injured or damaged at all, or in the sum of six thousand six hundred and eighteen and $\frac{25}{100}$ ths (\$6,618.25) dollars, gold coin, with legal interest thereon, from February 1st, 1888, or in sum of fourteen thousand four hundred and eighty-eight (\$14,488) dollars, or in any sum whatever; on the contrary, plaintiff alleges that defendant entered into said contracts fully informed and cognizant of all the conditions relating to the title of said lands, and was satisfied of the same, and stipulated upon the same in said contracts.

35 Wherefore, plaintiff prays judgment that the defendant take nothing by his cross-complaint, and that the plaintiff have judgment according to the prayer of his complaint on file.

JOSEPH D. REDDING,
Attorney for Plaintiff.

(Duly verified.)

Endorsed: Filed Aug. 30, 1892.

Transfer of Action.

(Title of Court and Cause.)

In this action a stipulation by counsel for respective parties consenting to a transfer of the action from this court to the superior court, in and for the city and county of San Francisco, State of California, having been filed, on motion of E. O. Larkins, Esq., repre-

senting the plaintiff herein, it is ordered that this action be transferred to the superior court, in and for the city and county of San Francisco, State of California, for trial.

STATE OF CALIFORNIA, }
County of Tulare, } ss :

I, John G. Knox, county clerk and *ex officio* clerk of the superior court, in and for the county of Tulare, State of California, do hereby certify the foregoing to be a true, full and correct copy of an order duly made and entered in the records of said court, on the 4th day of November, 1892, in said action.

Witness my hand and seal of said court affixed this 4th day of November, 1892.

JOHN J. KNOX, *Clerk*,
By W. F. THOMAS, *Deputy*.

Filed, with all the other papers in the action, in the office of the clerk of the superior court of said city and county of San Francisco, December 8, 1892.

In the Superior Court in and for the City and County of San Francisco, State of California.

SOUTHERN PACIFIC RAILROAD COMPANY, Plaintiff, }
vs.
DARWIN C. ALLEN, Defendant. }

Findings of Facts and Conclusions of Law.

On the — day of April, 1893, the above-entitled cause was regularly called for trial, J. D. Redding, Esq., appearing as counsel for said plaintiff, and Robert Harrison, Esq., appearing as counsel for defendant. Whereupon, evidence both oral and documentary was adduced on behalf of of the respective parties, and thereafter, after argument of counsel, the cause was submitted to the court for decision.

And the court having fully considered the matter, and being fully advised in the premises, now makes and finds the following its findings of fact and conclusions of law therein.

Findings of Fact.

That on the first day of February, A. D. 1888, the plaintiff and defendant entered into all of the certain several contracts in writing, alleged in the complaint, and annexed thereto as Exhibit "A" and said contracts have not been rescinded, or modified, but are in full force and effect.

II.

That on the 1st day of February, 1889, there became due and owing plaintiff from defendant, under the terms of said contracts,

the sum of one thousand four hundred and forty-seven dollars and seventy-three cents for, and on account, of the second year's interest on the remainder of the purchase-money of the premises described therein and in said complaint.

38 That on the 1st day of February, 1890, there became due and owing plaintiff from defendant, under the terms of said contracts, the sum of one thousand four hundred and forty-seven dollars and seventy-three cents for, and on account, of the third year's interest on the remainder of the purchase-money of the premises described therein and in said complaint.

That on the 1st day of February, 1891, there became due and owing plaintiff from defendant, under the terms of the said contracts, the sum of one thousand four hundred and forty-seven dollars and seventy-three cents, for, and on account of the fourth year's interest in the remainder of the purchase-money of the premises described therein and in said complaint.

III.

That said sums of money, or any thereof, or any part of any thereof, have not been paid, but the whole thereof remain due and owing by defendant to plaintiff.

IV.

That demand for payment of each of said sums found due as aforesaid, was made upon defendant by plaintiff, prior to the commencement of this action.

39

V.

As to the alleged possession by defendant of the lands in said complaint described, and of all of them, no evidence was introduced herein in support thereof, and the court finds, therefore, that defendant never had actual possession of said lands, or of any part thereof.

VI.

The plaintiff is, and always has been, willing and ready to perform said contracts in all their covenants and conditions on its part to be performed upon full performance by defendant of the covenants and conditions of said contracts upon his part to be performed and fulfilled. That the lands and premises therein described were portions of the public domain of the United States and were granted to plaintiff by an act of the Congress of the United States, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast;" approved July 27, 1866. That all of said lands, save sec. 5, in township 23 south, range 19 east, M. D. M., are situated within a belt more than 20 miles and less than 30 miles from plaintiff's railroad, generally known as the indemnity belt; the said sec. 5 being within 20 miles of said railroad.

40 That the loss to plaintiff of odd-numbered sections within said

granted limits, *i. e.*, within 20 miles of said railroad, because of the various exceptions and reservations in said act provided for, is fully equal to all the odd-numbered sections within said indemnity belt.

That on March 19, 1867, an order was made by the Secretary of the Interior of the United States withdrawing or purporting to withdraw from sale or settlement under the laws of the United States, all of said lands situated in said indemnity belt; and that on August 15, 1887, another order was made by said Secretary of the Interior, revoking, or purporting to revoke, said first-named order, and restoring said lands to the public domain for the usual sale and settlement thereof. The first said order of withdrawal is set forth in vol. — of "Decisions of the Secretary of the Interior" at p. —, and the said second order in vol. 6 of said "Decisions" at pp. 84-92; and which said orders as so set forth are here referred to, and made a part of this finding. That plaintiff is the owner of said lands in fee

41 under the provisions of said act of Congress; that patents or a patent therefor, have not yet been issued to plaintiff by the Government of the United States; that it has not been finally determined that patents or a patent shall not issue therefor, or for any part thereof, but proceedings are now pending before the proper department of the Government of the United States, instituted by plaintiff to obtain patents or a patent for said lands and premises, and the whole thereof. That plaintiff has not been guilty of any want of ordinary diligence in instituting or prosecuting said proceedings to obtain said patents or patent.

VII.

That no representations were made by plaintiff to defendant which induced him to enter into the said contracts other than, or different from the facts as the same are recited in said contracts, and said facts as therein recited are true.

VIII.

No damage has been suffered by defendant as alleged in his cross-complaint herein.

Conclusions of Law.

And, as conclusions of law from the foregoing facts, the court finds and declares:

42 1. That plaintiff is entitled to a judgment or decree that defendant shall within, six months from and after the entry thereof, pay to plaintiff the whole of said sums due, as aforesaid, aggregating the sum of four thousand three hundred and forty-three dollars and nineteen cents, and if he shall fail to pay the same within the time aforesaid, said defendant and all persons holding said premises, or any part thereof under him, shall then and there, and by said decree, be forever barred and foreclosed of all claim, right or interest of, in, or to the said lands and premises, or any part thereof, and of all right to a conveyance of said lands, or any part thereof, from plaintiff, and of all or any right to purchase the same under the con-

tracts aforesaid, and that plaintiff be let into the possession of said premises, and the whole thereof.

2. That the plaintiff is entitled to recover its costs of this action. Let a judgment be entered in accordance with these findings.

EUGENE R. GARBER, *Judge*.

Dated October 30th, 1893.

Endorsed: Filed Oct. 30, 1893.

43

Decree.

(Title of Court and Cause.)

This cause having been regularly called for trial before the court, J. D. Redding, Esq., appearing as counsel for the plaintiff and Robert Harrison, Esq., appearing as counsel for defendant, and evidence in behalf of each of said parties having been adduced, and the cause submitted to the court for decision, and on the 30th day October, A. D. 1893, the court, being fully advised in the premises, filed its findings of fact and conclusions of law herein, and ordered that judgment be entered in accordance therewith.

Wherefore, by reason of the law and the premises, it is hereby ordered, adjudged, and decreed that defendant Darwin C. Allen pay to the plaintiff Southern Pacific Railroad Company within six months from and after the date hereof the sum of four thousand three hundred and forty-three dollars and nineteen cents in lawful money of the United States of America; and if said defendant shall fail to pay said sum to said plaintiff within the time aforesaid, said defendant, and all persons holding under him, the premises herein-

44 after described, or any part thereof; upon such default, shall be and hereby are forever barred and foreclosed of all claim, right or interest of, in or to the said lands and premises, or any part thereof, and of all right to a conveyance of said lands or any part thereof from plaintiff, and of all or any right to purchase the same under the contracts alleged in the complaint in this action, and that plaintiff be let into the possession of said premises and the whole thereof.

The lands and premises hereinbefore referred to are situate in the county of Tulare, State of California, and are known, described and designated in the public surveys of the United States as follows, to wit:

(Here follows a description of the lands as in plaintiff's complaint herein.)

It is further ordered, adjudged and decreed that the said plaintiff have and recover of and from the said defendant its costs of this action, amounting to the sum of \$—.

J. M. SEAWELL, *Judge*.

San Francisco, November 8th, 1893.

Filed Nov. 9, 1893. Recorded November 10, 1893, in Book 18 of Judgments, at page 629.

Notice of Appeal.

(Title of Court and Cause.)

Take notice that the defendant in the above-entitled action hereby appeals to the supreme court of the State of California, from the judgment and decree in said action therein given, made and entered in the said superior court, on the 10th day of November, 1893, in favor of the plaintiff in said action, and against said defendant, and from the whole of said judgment and decree.

Yours, &c.,

ROBT HARRISON,
Attorney for Defendant.

To the clerk of said superior court and Joseph D. Redding, Esq., attorney for plaintiff.

Dated this 10th day of March, A. D. 1894.

Endorsed: Service and receipt of the within notice of appeal, after filing, is hereby admitted this 10th day of March, 1894. Joseph D. Redding, attorney for plaintiff. Filed March 10th, 1893. M. C. Haley, clerk, by J. M. Sullivan, deputy clerk.

Stipulation.

(Title of Court and Cause.)

It is hereby stipulated that the foregoing printed transcript is a full and correct copy of the notice of appeal and of the judgment-roll in the therein-named action, save that there is omitted therefrom such exhibits to the complaint as are referred to in the stipulation immediately following that complaint, and that said printed transcript constitutes a full and sufficient transcript on appeal from the judgment and decree therein set forth.

Also that an undertaking on appeal, in due form, has been properly filed herein on behalf of appellant.

JOSEPH D. REDDING,
JOSEPH D. REDDING,
Attorney for Respondent.
ROBT HARRISON,
Attorney for Appellant.

Due service of the within is hereby admitted this 19th day of April, 1894.

JOSEPH D. REDDING,
Attorney for Respondent.

48

Filed April 17, 1896.

In Bank.

SOUTHERN PACIFIC RAILROAD Co., Respondent, }
vs. } No. 15714.
DARWIN C. ALLEN, Appellant.

This is an appeal from the judgment upon the judgment-roll.

The action is to compel the payment of moneys alleged to be due under contracts for the purchase of lands, and, in default of payment, to foreclose defendant's rights under the contracts, and for general relief. The action is on more than one contract, but they are alike in terms, and one will serve as a type of all. Plaintiff agreed to sell, and defendant to buy, a certain piece of land. At the date of the contract defendant paid one-fifth of the purchase price and one year's interest upon the unpaid portion, and agreed to pay the same interest annually in advance until the completion of the purchase, or the termination of the contract, together with all taxes and assessments levied upon the land; and to pay the remainder of the purchase price "on or before the 1st day of February, 1893." Defendant is given the right of immediate possession of the land, and upon the performance of all the conditions of his contract is to receive a deed for the land, which deed plaintiff agrees to make upon demand, "after the receipt of a patent therefor from the United States." The contract proceeds: "It is further agreed between the parties hereto, that the party of the first part claims all the tracts hereinbefore described, as part of a grant of lands to it by the Congress of the United States; that patent has not yet issued to it for said tracts; that it will use ordinary diligence to procure patents for them; that in consequence of circumstances beyond its control, it sometimes fails to obtain patents for lands that seem to be legally a portion of its said grant, therefore nothing in this instrument shall be considered as a guaranty or assurance that patent or title will be procured; that in case it be finally determined that patent shall not issue to said party of the first part for all or any of the tracts herein described, it will, upon demand, repay, without interest, to the party of the second part, all moneys that may have been paid to it by him on account of any such tracts as it shall fail to procure patent for, the amount of repayment to be calculated at the rate and price per acre fixed at this date for such tracts by said party of the first part, as per schedule on page three hereof; that said lands being unpatented the party of the first part does not guaranty the possession of them to the party of the second part, and will not be responsible to him for damages or cost in case of his failure to obtain and keep such possession."

This action was brought upon default of defendant in paying the second, third and fourth years' installments of interest. It was commenced before the expiration of the five years' limitation for the payment of the balance of the purchase-money, but was brought to trial and decided after the lapse of that period. Defendant, by answer, denied title in plaintiff, and by cross complaint alleged

false representations by plaintiff of its title, injury to himself therefrom, and concluded with an offer of rescission and demand for a return of the moneys paid by him. The findings are in favor of plaintiff, except as to the fact of possession by defendant of the lands described in the complaint, and against the answer and cross-complaint, and the decree requires defendant to pay within six months the amount found due as unpaid interest, or be debarred and foreclosed of all right and interest in and to said lands, and in and under the contracts.

The only question really involved in the case is as to the construction of the contracts sued upon. It is contended by the defendant that he was under no obligation to purchase the land or to pay the remainder of the purchase price, unless the plaintiff should, *within the five years*, obtain a patent for the land; and that, as the plaintiff had failed to obtain a patent within that time, and as the action was not tried until after the expiration of that time, the defendant was entitled to a rescission of the contract. But clearly the contracts will not bear any such construction. The defendant contracted unconditionally to pay the remainder of the purchase price "on or before" a certain day named, and to pay interest annually in advance on the remainder; but the plaintiff contracted to convey to defendant only "upon the receipt of a patent," and was to repay the money only "in case it be *finally determined* that patent shall not issue." The defendant, therefore, was not entitled to terminate the contract or to require a repayment of the moneys paid, until the question of the issue of a patent to the plaintiff should be "finally determined." The findings state that proceedings are now pending in the United States Land Department for the issue of patent to the plaintiff, and that it has not been finally determined that such patent shall not issue. At the time, therefore, at which defendant contracted to pay the balance of the purchase price, plaintiff was not in default, nor was it in default at the time of the trial.

It will thus be seen that, under these contracts, the times fixed for the payment by defendant of the balance of the purchase price and the installments of interest on that balance, might all arrive before the happening of the event upon which plaintiff agreed to convey, or before the happening of the event upon which plaintiff agreed to return the money paid. A certain day was appointed for the payment of the balance of the purchase price, and the interest thereon in advance. But the issuance of the patent to plaintiff, or the final determination that such patent should not issue, were events the time of the occurrence of which was uncertain, and which might take place long after the expiration of the five years. The case is, therefore, strictly within the well-established rule that, "if a day be appointed for payment of money, or a part of it, or for doing any other act, and the day is to happen or *may* happen before the thing which is the consideration of the money, or the act is to be performed, an action may be brought for the money, or for not doing such other act, *before performance*; for it appears that the party relied upon his remedy, and did not intend to make the per-

formance a condition precedent." *Donovan vs. Judson*, 81 Cal., 334; *R. R. Co. vs. Butler*, 50 Cal., 574; *Platt vs. Gilchrist*, 3 Sandf., 125; *Loud vs. Pomona, etc., Co.*, 153 U. S., 564, 576; *Coleman vs. Rowe*, 5 Haw., Miss., 460; *Couch vs. Ingersoll*, 2 Pick., 301; *Bean vs. Atwater*, 4 Conn., 10; *Edgar vs. Boies*, 11 S. & R., 450. The whole framework of the contracts shows that both parties understood that the question whether or not patents would issue was one of uncertainty and that it was impossible to know, in advance, when that question would be "finally determined." Defendant, with full knowledge of that fact, contracted to make his payments at all events and within certain specified times; merely reserving the right to a repayment of the money in case the particular title contracted for should fail. Under these circumstances the obtaining of patents could not be a condition precedent to his obligation to make the deferred payments.

The defendant further contends that the contracts were void *ab initio*, for want of mutuality or consideration, or amounted at most to mere offers to purchase on his part. This contention cannot be sustained. Plaintiff claimed title to these lands, but its title had not been perfected by patent. Defendant had the same opportunity as plaintiff of knowing the nature and probable validity of that claim. Under these circumstances plaintiff agreed to convey to defendant when it should obtain a patent, and to permit defendant to enter into possession of the land at once. In consideration of these premises defendant agreed to purchase when a patent should be issued, paid at once one-fifth of the purchase price and one year's interest on the balance, and agreed to pay the remainder (with interest thereon annually in advance) on or before a given date, with the right to a repayment without interest in the event of an ultimate failure to obtain a patent. These promises were strictly mutual, and each constituted a sufficient consideration for the other. Plaintiff by its contract surrendered its right to contract with or sell to any one else, and yielded to defendant the present right to possession which it claimed. These concessions were clearly a detriment to plaintiff, and, in a legal sense, an advantage to defendant; and they, therefore, furnished a consideration for defendant's promise to pay.

Defendant also claims that the bringing of this action was a rescission of the contracts, which entitled him to a return of the money already paid. But since, under the contract, plaintiff was entitled absolutely to receive the money at the times agreed upon, and to have the benefit of its use until the final determination of the question of the issuance of patent, it was entitled to enforce the collection of the money by this action, and in the event of a failure to pay to have defendant foreclosed of his rights under the contracts. *Keller vs. Lewis*, 53 Cal., 118; *Fairchild vs. Mullan*, 90 Cal., 194; *Hansbrough vs. Peck*, 5 Wall., 506. The decree gave the defendant the alternative of paying within six months, or suffering foreclosure; and this was in accordance with equity. It may be, in view of the fact that the action was tried after the expiration of the time for the payment of the last installment of the purchase price, that

the decree should have required the defendant to pay the balance of the principal as well as the unpaid installments of interest; but the error, if any, in that particular is in favor of defendant, and cannot be considered on his appeal.

It follows from these considerations that plaintiff is entitled to the relief granted by the court below, and that the judgment must be affirmed.

It is so ordered.

VAN FLEET, J.

We concur:

McFARLAND, J.

GAROUTTE, J.

HARRISON, J.

Dissenting Opinion.

I dissent, under the conviction that the interpretation given to this contract in the opinion rendered by department two is proper and sound. It was there said (S. P. Co. vs. Allen, 40 Pac. Rep., 752): "Plaintiff agreed to sell, and defendant to buy, a certain piece of land. At the date of the contract defendant paid one-fifth of the purchase price and one year's interest upon the unpaid portion, and agreed to pay the same interest annually in advance until the completion of the purchase or the termination of the contract. The time of payment for the unpaid part of the purchase price was 'on or before the first day of February, 1893;' that is to say, within five years from the execution of the contract. Upon performance by defendant of the conditions of his contract he was entitled: First, to take and hold possession of the land; and, second, to receive a deed for the same upon demand, and after payment of the remaining four-fifths of the purchase price, which deed plaintiff agreed to make 'after the receipt of a patent therefor from the United States.' The contract proceeds: 'It is further agreed between the parties hereto that the party of the first part claims all the tracts hereinbefore described as part of a grant of lands to it by the Congress of the United States; that patent has not yet issued to it for said tracts; that it will use ordinary diligence to procure patents for them; that, in consequence of circumstances beyond its control, it sometimes fails to obtain patent for lands that seem to be legally a portion of its said grant, therefore nothing in this instrument shall be considered a guaranty or assurance that that patent or title will be procured; that, in case it be finally determined that patent shall not issue to said party of the first part for all or any of the tracts herein described, it will, upon demand, repay, without interest, to the party of the second part all moneys that may have been paid to it by him on account of any such tracts as it shall fail to procure patent for, the amount of repayment to be calculated at the rate and price per acre fixed at this date for such tracts by said party of the first part, as per schedule on page 3 hereof; that, said lands being unpatented, the party of the first part does not guaranty the possession of them to the party of the second part, and will not be

responsible to him for damages or cost in case of his failure to obtain and keep such possession.' * * * Under such circumstances defendant agreed to buy and pay for these lands at any time within five years, should plaintiff's claim ripen into a perfect title by the issuance of a patent. Plaintiff agreed, as the consideration flowing from it—first, to convey to defendant, and thus to forego its right to contract with or sell to any one else; second, to yield to the defendant in the meantime such possession, use, and enjoyment of the lands as would otherwise belong to it.

49 Defendant, to secure these advantages to himself, paid one-fifth of the purchase price, and agreed to pay interest upon the remainder of it. If, at any time within five years, plaintiff's title was perfected, defendant had the right upon payment to compel a conveyance of it to himself. If, at the expiration of five years, the result had not been reached, defendant was entitled to repayment of his moneys, without interest, while plaintiff, for foregoing its right to make other contracts, and for yielding to defendant its right to the occupancy and enjoyment of the lands, was to be compensated by the use, without payment of interest, of the defendant's moneys held by it. It is true these terms are not explicitly declared in the contract, as here set forth, but they fairly state the expressed agreement of the parties."

There is no doubt but that in a contract for the sale of land the covenant to convey and the covenant to pay may be made independent, but there is likewise no doubt but that the general rules of interpretation require these covenants to be construed as interdependent unless the contrary is made clearly to appear upon the face of the contract, and where doubt arises as to the intent of the parties that doubt should be resolved by a construction holding them to be interdependent first, as expressing the meaning most probably intended by the parties, and, second, as being the interpretation consonant with the spirit of equity and fair dealing. The seller ought not to be compelled to part with his property without receiving the consideration, nor the purchaser to part with his money without an equivalent in return.

In *Hill vs. Grigsby*, 35 Cal., 656, this court said: "It is very correctly said in *Bank of Columbia vs. Hagner*, 1 Pet., 455, that 'in contracts of this description the undertakings of the respective parties are always considered dependent unless a contrary intention clearly appears;' and the reason assigned, as well as the rule, would be applicable here were the words of the covenant of doubtful import. 'A different construction would in many cases lead to the greatest injustice, and a purchaser might have payment of the purchase-money enforced upon him, and yet be disabled from procuring the property for which he paid it.' The authorities in support of these principles are very numerous, and there is a greater degree of uniformity among them than is usual on a question presented, as this has been, in so many different aspects."

A man purchases real property for purposes of improvement and permanent ownership, or for barter and sale. He may, and frequently does, pay the purchase-money in speculation, whether or

not the title he receives shall prove a good title, but he at least buys something. No case has been called to our attention, and none is cited in the prevailing opinion, in which he pays the purchase price upon a speculation as to whether the vendor shall give him something or nothing. For it will be noted that the plaintiff does not agree at any fixed time, or at all, to convey to defendant such title as it has or may then have, but merely to convey to it its title when perfected by the issuance of a patent. If it obtains no patent it conveys nothing. In all the cases which are cited, and in which the question of land sales is considered, it was some interest in land, or claim of title, which the vendee was purchasing, and which he agreed to pay for in advance. Here it is quite otherwise, and it may be instructive to see just what effects must logically follow the interpretation given by the prevailing opinion: Allen at the end of five years has paid the full purchase price for the land, with interest. He has been permitted to take possession of it, but has not been secured or warranted even in that. He has no title to the land whatsoever. He cannot compel a conveyance to him of the company's claim or interest in the land. There is no definite future time fixed upon the arrival of which he may recover either his money or the land. He has parted with his money and the use of it for ten, twenty, thirty or fifty years—until it "shall be finally determined that a patent is not to issue." Meanwhile he has no interest to sell, so that it is impossible for him to retrieve himself. He dare not improve the land, because he is not secured in possession or improvements, and he cannot even sell or assign his rights under the contract itself, for that is forbidden by its terms. At the end of an undetermined time, if plaintiff, who is called upon to use only ordinary diligence, fails to obtain a patent, defendant receives nothing but the principal of the purchase price. If that time covered a number of years, as it well might, the use of the money of which defendant was deprived, and which plaintiff has gained, would equal or exceed the principal itself, and yet for this loss defendant receives nothing. It is not easy to believe that a sane man would so contract, and if this be the true interpretation the contract is one without parallel. Upon the other hand, it may be readily gathered from the contract itself that the parties assumed that the question of the issuance of the patent would be determined within five years, and that if determined by or within that time the corresponding rights and liabilities of the parties to it would attach. If not then determined the transaction should be at an end, and plaintiff would have had the use of the full purchase price (or its equivalent in interest) for its agreement to sell to defendant and to yield him possession, while for these considerations defendant would have paid this money with the right to the return of the principal sum at the end of five years—a time long enough in which to bring the contract to an end in one or another way.

The lapse of five years without issuance of a patent is intended to be, so far as the rights of the parties to this contract are concerned, in and of itself a final determination that the patent is not to issue.

So construed the covenants are clearly dependent.

The one interpretation manifestly exposes the defendant to such untoward danger and loss that it is inconceivable that a man of ordinary intelligence would have bound himself by it; the other expresses a fair business contract, such as any two individuals might enter into.

In the prevailing opinion it is said that the contract clearly will not bear the latter construction. That it is the equitable construction is not and cannot be questioned. Upon the other hand, there should be the clearest and most satisfying language in the contract to warrant the interpretation given it. That language I am unable to find, and if there be an existing doubt, under all the authorities and under the law of this court above quoted, the doubt should be resolved against the contention that the covenants are independent.

HENSHAW, J.
TEMPLE, J.

In Bank.

SOUTHERN PACIFIC R. R. Co. }
vs. } No. 15714.
DARWIN C. ALLEN.

I dissent, but upon a different ground from that stated by Justice Henshaw. As to the construction of the contract I concur in the views of the majority, but I do not think that the breach of this particular kind of a contract of sale gives the vendor the right to go into equity to claim specific performance or to foreclose the right of the purchaser. In ordinary contracts for the sale of land the vendor has the right either to rescind or to foreclose for failure of the vendee to make deferred payments, because in ordinary contracts of sale the vendor is able to perform the contract on his part by making a conveyance. But when, as in this case, the vendor is not ready to convey, and may never be able to do so, I think he should be limited to rescission or to his action to recover the installments due, and that he has no right to claim the relief awarded by this judgment.

BEATTY, C. J.

50

Filed June 6, 1895.

Department Two.

SOUTHERN PACIFIC RAILROAD COMPANY, Plaintiff and }
Respondent, } No. 15714.
vs. }
DARWIN C. ALLEN, Defendant and Appellant.

Appeal from the judgment.

The action is to compel the payment of moneys alleged to be due under contracts for the purchase of lands, and, in default of payment, to foreclose defendant's rights under the contracts, and for general relief. The contracts are many, but they are alike in terms,

and one will serve as a type of all. Plaintiff agreed to sell, and defendant to buy, a certain piece of land. At the date of the contract, defendant paid one-fifth of the purchase price, and one year's interest upon the unpaid portion, and agreed to pay the same interest annually in advance until the completion of the purchase, or the termination of the contract. The time of payment for the unpaid part of the purchase price was "on or before the 1st day of February, 1893;" that is to say, within five years from the execution of the contract. Upon performance by defendant of the conditions of his contract he was entitled—first, to take and hold possession of the land; and, second, to receive a deed for the same, upon demand, and after payment of the remaining four-fifths of the purchase price, which deed plaintiff agreed to make "after the receipt of a patent therefor from the United States." The contract proceeds: "It is further agreed between the parties hereto that the party of the first part claims all the tracts hereinbefore described, as part of a grant of lands to it by the Congress of the United States; that patent has not yet issued to it for said tracts; that it will use ordinary diligence to procure patents for them; that, in consequence of circumstances beyond its control, it sometimes fails to obtain patent for lands that seem to be legally a portion of its said grant, therefore nothing in this instrument shall be considered a guaranty or assurance that that patent or title will be procured; that, in case it be finally determined that patent shall not issue to said party of the first part for all or any of the tracts herein described, it will, upon demand, repay, without interest, to the party of the second part, all moneys that may have been paid to it by him on account of any such tracts as it shall fail to procure patent for, the amount of repayment to be calculated at the rate and price per acre fixed at this date for such tracts by said party of the first part, as per schedule on page 3 hereof; that said lands being unpatented, the party of the first part does not guaranty the possession of them to the party of the second part, and will not be responsible to him for damages or cost in case of his failure to obtain and keep such possession." This action was brought upon default of defendant in paying the second, third, and fourth years' installments of interest. It was commenced before the expiration of the five years' limitation, but was brought to trial and decided after the lapse of that period. Defendant, by answer, denied title in plaintiff, and, by cross-complaint, alleged false representations by plaintiff of its title, injury to himself therefrom, and concluded with an offer of rescission, and demand for a return of the moneys paid by him. The findings are against the answer and cross-complaint, and the decree requires defendant to pay within six months the amount found due as unpaid interest, or be debarred and foreclosed of all right and interest in and to the lands, and in and under the contracts.

The court found plaintiff to be the owner, in fee, of the lands, and much nice argument is advanced for and against the finding. But, under our interpretation of the contract, it is a matter irrelevant. Plaintiff was to convey, not the title it had, nor the title in fee found by a court, but the title evidenced by and under the patent of the

United States, and defendant was not to be called upon to consummate the purchase until this muniment of title had issued. The contracts were not void *ab initio* for lack of mutuality or consideration. The averments of false representations as to title having been negatived by the findings, the transaction between the parties amounted to this: Plaintiff claimed title to Government lands, which claim had not been perfected by the issuance of a patent. The sources of knowledge as to the nature and probable validity of the claim were open to defendant, and he did not, therefore, contract blindly. Under such circumstances, defendant agreed to buy these lands at any time within five years, should defendant's claim ripen into a perfect title by the issuance of a patent. Plaintiff agreed, as the consideration flowing from it—first, to convey to defendant, and thus to forego its right to contract with or sell to any one else; second, to yield in the meantime to defendant such possession, use, and enjoyment of the lands as would otherwise belong to it. Defendant, to secure these advantages to himself, paid one-fifth of the purchase price, and agreed to pay interest upon the remainder of it. If, at any time within five years, plaintiff's title was perfected, defendant had the right to compel a conveyance of it to himself. If, at the expiration of five years, the result had not been reached, defendant was entitled to repayment of his moneys, without interest, while plaintiff, for foregoing its right to make other contracts, and for yielding to defendant its right to the occupancy and enjoyment of the lands, was to be compensated by the use, without payment of interest, of the defendant's moneys held by it. It is true, these terms are not explicitly declared in the contract, as here set forth, but they fairly state the expressed agreement of the parties. Plaintiff, then, being entitled to the use of the moneys annually to be paid as interest, could enforce the collection of them by this action, after persistent refusal to pay, or have defendant foreclosed of his rights under the contract, for violation of its conditions. *Keller v. Lewis*, 53 Cal., 118; *Fairchild v. Mullan*, 90 Cal., 194; 27 Pac., 201; *Hansbrough v. Peck*, 5 Wall., 506. Plaintiff is not asking a rescission. To the contrary, it is demanding that defendant be compelled to perform the conditions of his contract, and that upon his refusal to do so the rights of the parties under the contract be determined in accordance with equity. *Hansbrough v. Peck*, *supra*. The decree gave the defendant the alternative of paying within six months, or suffering foreclosure. It is urged against it that, since the five years had expired, and plaintiff had not obtained a patent, to compel defendant to pay the delinquent interest would be the requirement of a vain thing, since defendant would be entitled to its immediate return, and that, therefore, the court should not have so decreed, but, to the contrary, should have ordered repaid by plaintiff the moneys of defendant in its hands. The pleadings sufficiently disclose the dates, by which it appeared that the action was tried and determined after the time limited by the contract for its completion. Plaintiff, having failed to secure its patent within that time, was entitled, as has been said—first, to the use of the one-fifth part of the purchase price without payment of interest

therefor; and, second, in like manner, to the use of the annual installments of interest as they fell due. Though the decree of the court would have been consonant with equity, had it been rendered before the five years had expired, it failed to do complete justice under the changed situation brought about by the lapse of that time. While a decree in equity generally operates upon the parties and subject-matter as they stood at the commencement of the proceedings, it only does so to subserve the ends of justice. When, as here, a radical change in the status has been brought about by the passing of time, under the very terms of the agreement, and knowledge of this change is, as here, judicially before the court, or is brought in by appropriate pleading, its decree should be addressed to the rights existing, not at the commencement, but at the time of the determination, of the action. The court should therefore decree to plaintiff, in lieu of the use of the interest payments of which it was deprived by the default of defendant, 7 per cent. interest upon each of these amounts from the date upon which they, respectively, fell due, until the date of the decree; should decree the return by plaintiff to defendant of any excess of the moneys of defendant in its hands over the amount found due, or render a judgment in favor of plaintiff for any deficiency, and, upon a compliance with this judgment, terminate the contractual relations of the parties, as provided by their agreement. Let the judgment and decree be modified accordingly.

HENSHAW, J.

We concur.

TEMPLE, J.

McFARLAND, J.

51 Supreme Court of the United States, of October Term, A. D. 1896.

DARWIN C. ALLEN, Plaintiff in Error,

vs.

SOUTHERN PACIFIC RAILROAD COMPANY, Defendant in Error. }

Afterwards, to wit, on the first Monday of August (A. D. 1897), in this term, before the justices of the Supreme Court of the United States of America, at the Capitol, in the city of Washington, in the District of Columbia, comes the plaintiff in error, Darwin C. Allen, by his attorney, Edward R. Taylor, and says that in the record and proceedings aforesaid, namely, the judgment and decree of the supreme court of the State of California in that suit or action therein entitled "Southern Pacific Railroad Company, respondent, vs. Darwin C. Allen, appellant," there is manifest error, especially in this, to wit:

First. The said judgment and decree erred in that it did not and does not order or require, as a necessary condition to the annulment or foreclosure of the contracts and of the rights therein and thereunder of said Darwin C. Allen by said judgment and decree

52 annulled and foreclosed, the repayment and return by said Southern Pacific Railroad Company to said Darwin C. Allen of the sum of six thousand six hundred and eighteen and ²³/₁₀₀ dollars by him paid to said Southern Pacific Railroad Company on account and under the terms of said contracts so thereafter annulled as aforesaid, together with interest, at the California statutory rate of seven per cent. per annum, from February 1, 1888, the date of said payment.

Second. The said judgment and decree erred in that it did not and does not order or require the repayment and return by said Southern Pacific Railroad Company to said Darwin C. Allen of said sum of \$6,618.23, so paid as aforesaid, together with interest thereon at the rate aforesaid from February 1, 1893, the date of the expiration and annulment of said contracts by their own terms.

Third. The said judgment and decree erred in that it did not and does not order or require the repayment and return by said Southern Pacific Railroad Company to said Darwin C. Allen of all moneys by him paid to said company on account and under the terms of said contracts, less the amount of interest at said statutory rate on all moneys by said Darwin C. Allen to be paid to said company, under the requirements of said contracts, prior to the expiration and annulment of said contracts by their own terms.

Fourth. The said judgment and decree erred in that it did not and does not adjudge or declare the said contracts null and void for lack of consideration, and thereupon order and decree the return by said Southern Pacific Railroad Company to said Darwin C. Allen of all moneys paid by him to said company on account of said contracts, together with interest thereon at the rate aforesaid from the date of their payment.

53 Fifth. The said judgment and decree erred in that it did not and does not adjudge or declare the said contracts and all the obligations thereof to have, under their own terms, ceased and expired with the first day of February, 1893, and thereupon order repaid to said Allen by said Southern Pacific Railroad Company all moneys paid said company by said Allen under and on account of said contracts, together with interest at the rate aforesaid from February 1, 1893.

Sixth. The said judgment and decree erred in that it did not and does not formally rescind the said contracts nor declare them to have been rescinded by the parties thereto, and thereupon order repaid to said Allen by said Southern Pacific Railroad Company all moneys by it received from him under or on account of said contracts, with interest thereon at the rate aforesaid from the date of such rescission.

Seventh. The said judgment and decree erred in declaring that under the terms of said contracts or otherwise there became or was at any time or times due from said Allen to said Southern Pacific Railroad Company any money or sum or sums of money whatever.

Eighth. The said judgment and decree erred in declaring that said Southern Pacific Railroad Company was or ever had been

willing and ready to perform said contracts in all their covenants and conditions on its part to be performed, and especially in declaring and holding that said Southern Pacific Railroad Company was ever ready or able to convey to said Allen the lands in said contracts described and agreed to be by it conveyed to said Allen.

Ninth. The said judgment and decree erred in declaring and holding that said Southern Pacific Railroad Company was at any time possessed of said lands or of the title to or of any conveyable or contractual interest in them.

Tenth. The said judgment and decree erred in finding and declaring "that it has not been finally determined that patents or a patent shall not issue" for said lands or "or for any part thereof."

Eleventh. The said judgment and decree erred in finding and holding that said Southern Pacific Railroad Company "has not been guilty of any want of ordinary diligence in instituting or prosecuting proceedings to obtain said patent or patents."

And the said Darwin C. Allen prays that the judgment and decree aforesaid may be reversed, annulled, and altogether held for naught, and that he may be restored to all things which he hath lost by occasion of said judgment and decree.

EDWARD R. TAYLOR,
Attorney for Plaintiff in Error.

55 [Endorsed:] 15714. Supreme Court of the United States.
Darwin C. Allen, plaintiff in error, vs. Southern Pacific Railroad Company, defendant in error. Assignment of errors.

56 UNITED STATES OF AMERICA, ss :

The President of the United States of America to the supreme court of the State of California, Greeting :

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said supreme court, before you (being the highest court in the State of California in which a decision thereof could be had), between The Southern Pacific Railroad Company, as respondent therein, and Darwin C. Allen, as appellant therein, wherein there was drawn in question, necessarily involved and passed upon, the validity of a statute of and of an authority exercised under the United States, and a right, title, privilege, and immunity specially claimed by said Darwin C. Allen under said statute and also under said authority, and wherein it was decided that the said statute and authority and said claim of right, title, privilege, and immunity thereunder were each and all invalid, a manifest hath happened, to the great damage of the said Darwin C. Allen, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby command, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the

same at Washington, in the District of Columbia, on the first Monday in August next, in the said Supreme Court to be there and then held, that, the record and proceedings aforesaid be inspected, the said Supreme Court may cause further to be done therein to correct that error what or right and according to the law and custom of the United States should be done.

Seal U.S. Circuit Court,
Northern Dist. Cal.

Witness the Hon. Melville W. Fuller,
Chief Justice of Supreme Court of the
United States, this 7th day of June, in the
year of our Lord one thousand eight hundred
and ninety-seven, and of the Independence
of the United States the one hundred and twenty-first.

W. J. COSTIGAN,
Clerk of U. S. Circuit Court, N. Dist. of Cal.

The above writ of error is hereby allowed.

W. H. BEATTY,

*Chief Justice of the Supreme Court of the
State of California.*

58 [Endorsed:] Supreme Court of the United States. Darwin
C. Allen, plaintiff in error, vs. Southern Pacific Railroad
Company, defendant in error. Writ of error.

Service of the within writ of error on June 8, 1897, is hereby acknowledged.

59 UNITED STATES OF AMERICA, ss:

To Southern Pacific Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, on the second day of August, A. D. 1897, pursuant to a writ of error addressed to the supreme court of the State of California by the Supreme Court of the United States and filed in the office of the clerk of said supreme court of the State of California, wherein Darwin C. Allen is the plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment and decree in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the
Seal Supreme Court of California. day of June, A. D. 1897, and of the Independence of the United States the one hundred and twenty-first.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

60 [Endorsed:] 15714. In the Supreme Court of the United States. Darwin C. Allen, plaintiff in error, vs. Southern Pa-

cific Railroad Company, defendant in error. Citation. Filed ———, 189—. ———, clerk U. S. circuit court, northern district of California.

Service of within citation by copy admitted this 8th day of June, A. D. 1897, reserving all legal objections.

WM. F. HERRIN,
Attorney for Defendant in Error.

61 In the Supreme Court of the State of California. In Bank.

SOUTHERN PACIFIC RAILROAD Co., Respondent,	} No. 15714.
<i>vs.</i>	
DARWIN C. ALLEN, Appellant.	

On appeal from the superior court in and for the city and county of San Francisco.

And now, at this day, this cause being called, and having been heretofore submitted and taken under advisement, and all and singular the law and premises having been fully considered, the opinion of the court herein is delivered by Van Fleet, J. We concur: McFarland, J., Garoutte, J., Harrison, J. Dissenting opinion: Henshaw, J., Temple, J. I dissent: Beatty, C. J.

Whereupon it is adjudged and decreed by the court that the judgment of the superior court in and for the city and county of San Francisco in the above-entitled cause be, and the same is hereby, affirmed.

I, T. H. Ward, clerk of the supreme court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above-entitled cause on the 17th day of April, 1896, and now remaining of record in my office.

Witness my hand and the seal of the court, affixed at my office, this 23 day of July, A. D. 1897.

[Seal Supreme Court of California.]

T. H. WARD, *Clerk*,
By R. A. MARSHALL, *Deputy*.

62 [Endorsed:] No. —. In the supreme court, State of California. Remittitur. ——— *vs.* ———. Clerk's costs, \$—. Paid by appellant, \$—. Paid by respondent, \$—. Total, \$—. T. H. Ward, clerk, by ———, deputy.

63 Supreme Court of the United States.

DARWIN C. ALLEN, Plaintiff in Error,	}
<i>vs.</i>	
SOUTHERN PACIFIC RAILROAD COMPANY, Defendant in Error.	

Know all men by these presents that we, Darwin C. Allen, Robert Harrison, and Thomas Penlington, of San Francisco, California, are held and firmly bound unto Southern Pacific Railroad Company, a

corporation organized and existing under the laws of the State of California, in the sum of three hundred and fifty dollars, to be paid to said Southern Pacific Railroad Company, its successors or assigns; to which payment, well and truly to be made, we bind ourselves, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our own seals and dated this 8th day of June, A. D. 1897.

The condition of this bond is such that whereas the above-named Darwin C. Allen hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment and decree rendered in the supreme court of the State of California, entitled therein "Southern Pacific Railroad Company, respondent, vs. Darwin C. Allen, appellant:" Now, therefore, if the said Darwin C. Allen shall prosecute his said writ of error to effect and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

DARWIN C. ALLEN. [SEAL.]
ROBT HARRISON. [SEAL.]
THOMAS PENLINGTON. [SEAL.]

In the presence of—

UNITED STATES OF AMERICA,
Northern District of California,
City and County of San Francisco, } ss :

Robert Harrison and Thomas Penlington, being each duly sworn, deposes and says, each for himself, that he is a resident and freeholder of the State of California and is worth the sum of three hundred and fifty dollars over and above all his just debts and liabilities, exclusive of property exempt from execution.

ROBT HARRISON.
THOMAS PENLINGTON.

Subscribed and sworn to before me the 8th day of June, 1897.
JAMES M. ELLIS,

[NOTARY'S SEAL.] Notary Public in and for the City and
County of San Francisco, State of California.

The above bond is approved.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

65 [Endorsed:] 15714. Allen, pl'ff in error, vs. So. Pac. Co.,
def't in error. Bond for costs. Filed July 6, 1897. T. H.
Ward, clerk, by R. A. Marshall, deputy.

66 I, T. H. Ward, clerk of the supreme court of the State of
California, do hereby certify that the foregoing papers in the
matter of Southern Pacific Company v. Darwin C. Allen on a writ

of error to the Supreme Court of the United States, and consisting of pages one to sixty, both inclusive, are true copies of the record in said case, consisting of the transcript on appeal, a copy of the opinion in said case rendered by the supreme court of California, the judgment (remittitur), the assignment of errors, original writ of error, copy of undertaking for costs, and citation, as appears from the records on file in my office.

Witness my hand and the seal of the supreme court of the State of California this 23rd day of July, 1897.

[Seal Supreme Court of California.]

T. H. WARD, *Clerk*,
By R. A. MARSHALL, *Deputy*.

67

Supreme Court of the United States.

DARWIN C. ALLEN, Plaintiff in Error,
vs.
SOUTHERN PACIFIC RAILROAD COMPANY, Defendant in Error. }

It is hereby stipulated that there shall be omitted from the printed record in error in above case the description of lands as shown in "transcript on appeal," commencing at folio 5 of and continuing thence to folio 48 of said transcript; and the clerk of this court is hereby authorized and directed to make said omission from the printed record of the case.

WM. F. HERRIN,
Attorney for Defendant in Error.
EDW. R. TAYLOR, (H.)
ROBT HARRISON,
Attorneys for Plaintiff in Error.

[Endorsed:] Supreme Court of the United States. Darwin C. Allen vs. Southern Pacific Railroad Company. Stipulation as to printed record.

68 [Endorsed:] Case No. 16,641. Supreme Court U. S., October term, 1897. Term No., 428. Darwin C. Allen, pl'ff in error, vs. The Southern Pacific Railroad Co. Stipulation to omit part of record in printing. Office Supreme Court U. S. Filed July 30, 1897. James H. McKenney, clerk.

Endorsed on cover: Case No. 16,641. California supreme court. Term No., 144. Darwin C. Allen, plaintiff in error, vs. The Southern Pacific Railroad Company. Filed July 30th, 1897.

P. 144.

Term No. 144.

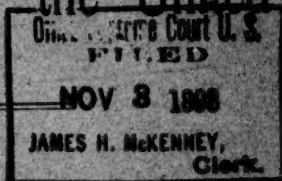
Reg. No. 1

Brief of Taylor for P. C.

IN THE

Filed Nov. 3, 1898.

Supreme Court of the United S



DARWIN C. ALLEN,

Plaintiff in

VS.

SOUTHERN PACIFIC RAILROAD COMP

Defendant

Brief of Argument of Plaintiff in C

EDWARD R. TAYLOR.

IN THE
SUPREME COURT
OF THE
UNITED STATES.

DARWIN C. ALLEN,

Plaintiff in Error,

VS.

SOUTHERN PACIFIC RAILROAD
COMPANY,

Defendant in Error.

Brief of Argument of Plaintiff in Error.

The case comes here by writ of error to the Supreme Court of the State of California. The following are

THE FACTS OF THE CASE.

In February, 1888, plaintiff and defendant executed some eighty-four instruments, a specimen copy of which is set out in the record.¹ The instru-

¹Trans. of Record, folio 22.

ments are in form contracts on the part of the Southern Pacific Railroad Company to sell, and on the part of Darwin C. Allen to buy, described tracts of land at a specified price. One-fifth of the price, and one year's advance interest on residue was paid at time of execution of the instruments; a like advance interest on residue to be paid each year; and the residue itself to be paid on or before February 1, 1893.² In the meantime, the buyer might take possession of the lands, *if he could*, and hold ~~them~~ ^{the} *if he could*, both at his own risk and expense,—the seller declaring that “said lands being unpatented, the party of the first part does not guaranty the possession of them to the party of the ~~second~~ ^{second} part, and will not be responsible to him for damages or cost in case of his failure to obtain and keep such possession.”³ The seller further agreed that, “upon the punctual payment of said purchase money, interest, taxes, assessments * * * the party of the first part will, after the receipt of a patent therefor from the United States, upon demand and surrender of this instrument, execute and deliver to the party of the second part, his heirs and assigns, a grant, bargain and sale deed of said premises.”^{3A} But “that the party of the first part claims all the tracts hereinbefore described as a part of a grant of

²Folio 23. ³Folio 25. ^{3A}Folio 23.

lands to it by the Congress of the United States;⁴ that patent has not yet issued to it for said tract; that it will use ordinary diligence to procure patents for them; that, as in consequence of circumstances beyond its control, it sometimes fails to obtain patent for lands that seem to be legally a portion of its said grant, therefore, *nothing in this instrument shall be considered a guarantee or assurance that patent or title will be procured*; that in case it be finally determined that patent shall not issue to said party of the first part for all or any of the tracts herein described, it will, upon demand, repay (without interest) to the party of the second part all moneys that may have been paid to it by him on account of any such tracts as it shall fail to procure patent for."⁵

In August, 1892, the Southern Pacific Railroad Company, as plaintiff, instituted an action against Darwin C. Allen, as defendant, in a court of first instance of California, setting out in full the contracts above epitomized, and alleging the failure of the buyer to pay the second, third and fourth year's interest therein required to be paid.⁶ The complaint alleged the plaintiff's ownership and seizure in fee of the lands at all times, but was

⁴The lands are not within the granted limits, but are in the indemnity belt adjoining. The contracts, it will be noticed, are misfits as to the latter class of lands, and evidently were prepared for sales of land within the granted limits, to which title of such portions as had not been previously aliened or incumbered passed upon location of route of road, but for which patents issued only upon construction and acceptance of stated sections of the road.

⁵Folio 25. ⁶Folio 18.

silent as to the receipt or non-receipt of patents.⁷ It did not offer the return of the moneys paid by the buyer. Although the contracts contained no clause forfeiting those moneys, nor giving a cause of action of any sort because of the non-payment of interest, the complaint, nevertheless, was framed on the theory that the non-payment of interest (the principal not being yet due) gave the seller a right of action for annulment of the contracts and forfeiture of the buyer's rights under them, and to all moneys paid on their account. Accordingly its prayer was for judgment "that there is due from said defendant to said plaintiff under and by virtue of said contracts the sum of \$4,343.19, the same being for the second, third and fourth year's interest on said contracts. * * * That in case said defendant fails to pay to plaintiff the amounts found due * * * then the defendant and all persons holding said premises under defendant shall be forever barred and foreclosed of all claim, right or interest in said lands and premises * * * and to a conveyance thereof * * * and that said contracts be declared null and void."⁸

The answer and cross-complaint of Allen did not deny the execution of the contracts nor the non-payment of interest, but defended on the ground of the invalidity of the contracts, and of

⁷Folio 15. ⁸Folio 20.

the false representations of plaintiff as to its title to the lands in those contracts described; defendant alleging that plaintiff had neither title, claim nor interest in the lands under its claimed grant by the Congress of the United States or otherwise. Alleged also that because of that lack of title he had been unable to get possession of the lands or to receive any benefit from them or from the contracts, and that he had paid to plaintiff as part purchase price of the lands the sum of \$6,618.25. He therefore asked the rescission, and gave his consent to plaintiff's prayer for the annulment of the contracts conditionally upon the return of his money payments on their account.⁹

Some months after the maturity of the contracts the case was tried, and on October 30, 1893, the trial court rendered its decision, that portion bearing on contested points being as follows:

"That plaintiff is, and always has been, willing and ready to perform said contracts in all their covenants and conditions on its part to be performed upon full performance by defendant of the covenants and conditions of said contracts upon his part to be performed and fulfilled. That the lands and premises therein described were portions of the public domain of the United States and were granted to plaintiff by an act of the Congress of the United States, entitled 'An Act granting lands to aid in the Construction of a Railroad and Telegraph Line from the States of Missouri and Arkansas to the Pacific Coast;' approved July

⁹Folios 29-31.

27, 1866. That all of said lands, save Sec. 5, in Township 23 south, range 19 east, M. D. M., are situated within a belt more than 20 miles and less than 30 miles from plaintiff's railroad, generally known as the indemnity belt; the said Sec. 5, being within 20 miles of said railroad.

"That the loss to plaintiff of odd numbered sections within said granted limits, *i. e.*, within 20 miles of said railroad, because of the various exceptions and reservations in said Act provided for, is fully equal to all the odd numbered sections within said indemnity belt.

"That on March 19, 1867, an order was made by the Secretary of the Interior of the United States withdrawing or purporting to withdraw from sale or settlement under the laws of the United States, all of said lands situated in said indemnity belt; and that on August 15, 1887, another order was made by said Secretary of the Interior, revoking, or purporting to revoke, said first named order, and restoring said lands to the public domain for the usual sale and settlement thereof. * * * That plaintiff is the owner of said lands in fee under the provisions of said Act of Congress; that patents or a patent therefor, have not yet been issued to plaintiff by the Government of the United States; that it has not been finally determined that patents or a patent shall not issue therefor, or for any part thereof, but proceedings are now pending before the proper department of the Government of the United States, instituted by plaintiff to obtain patents or a patent for said lands and premises, and the whole thereof."¹⁰

Judgment was thereupon ordered and entered in favor of the plaintiff therein as prayed for in

¹⁰Folios 39-41.

its complaint, without requiring plaintiff to return any of the moneys received from the defendant. An appeal from that judgment was made by the defendant therein to the Supreme Court of California, and was argued and submitted to Department No. One of that Court. In June, 1895, a decision was rendered by that Department of the Court modifying the judgment appealed from to the extent of ordering the restoration of all money paid by the buyer, less interest, etc., the Court holding that the covenant of the contracts to pay for in full, and that to convey the lands were interdependent, and that, as the time for closing the transactions had arrived and passed without power in the seller to convey, the contracts had expired.¹¹

In July, 1895, the judgment of the Court in Department was, on petition of the Railroad Company, set aside, the case transferred to the Court in Bank, and there argued and submitted. In April, 1896, the judgment here sought to be reviewed was rendered, affirming the judgment of the trial Court. The Court in Bank differed with that in Department (by a bare majority) in holding that the covenants to pay for, and to convey the lands were *independent*, and that the buyer must pay the entire price at the date called for in the contracts, although the seller could give nothing

¹¹Trans., p. 20.

in return—neither title, assurance of title, nor possession of the lands so paid for.¹²

SPECIFICATION OF ERRORS.

The case in the Supreme Court of California was based on the judgment roll,¹³ *i.e.*, the pleadings and judgment. And as the judgment included the "decision" or findings of facts of the trial court which, with the admitted averments of the pleadings, constituted a full statement of the case, no formal specification of errors in transcript of record or in brief was in that Court required.

In this Court the formal assignment of errors contained in the record is also a specification of the errors we here complain of.

It may be remembered that the judgment forfeited the buyer's rights to a conveyance of the lands, and annulled the contracts, without requiring the restoration to the buyer of the moneys paid on account of those promised conveyances. The non-return of his money is the buyer's only grievance.

Assigning, therefore, the failure of the judgment to require a return of the portion of the purchase price paid as the ultimate error, the intermediate and subsidiary errors of the Court may be specified as follows:

¹²Trans., p. 15. ¹³Folios 45, 46.

1. In declaring and adjudging that the Southern Pacific Railroad Company was ever ready or willing to perform the covenants or conditions of the contracts set out in its complaint, or that said Company was ever ready or willing to, or could possibly convey the lands in said contracts described to said Darwin C. Allen.

See Trans. of Record, folio 39.

2. In declaring and adjudging that said Railroad Company was at any time the owner of said lands in fee or otherwise, or ever had any possession of, or interest in, or claim to them.

See Trans., folio 41.

3. In declaring and adjudging "that it had not been finally determined that patents or a patent shall not issue" to said Railroad Company for said lands.

See Trans., folio 41.

4. In declaring and adjudging that said Railroad Company "had not been guilty of any want of ordinary diligence in instituting or prosecuting proceedings to obtain said patent or patents."

See Trans., folio 41.

5. In failing to adjudge and declare that the cause of action in the complaint herein alleged authorized a judgment for a *rescission* of said contracts only.

6. In failing to adjudge and declare that said contracts were void and unenforceable because without consideration for the promise of the buyer; (a) the seller having no assignable or vested interest in the lands to be conveyed, and (b) the seller not having agreed absolutely to sell or convey said lands.

7. In failing to adjudge and declare that the contracts could not be specifically enforced

against the buyer because (*a*) of lack of mutuality of remedy, since they could not be enforced against the seller, (*b*) the seller had no marketable title, and (*c*) misrepresentation of seller as to its title in claiming the lands to be a part of a grant to it.

8. In failing to adjudge and declare that the contracts had by their own terms become void (*a*) through limitation of time within which patents for the lands should be procured, and (*b*) through the final determination that patents for the lands would not issue to the Railroad Company.

Necessarily involved in the judgment of the California Supreme Court, none formally passed upon in the opinions rendered, but all presented and argued by counsel, were the questions upon which we depend to give this Court jurisdiction on writ of error.

THE FEDERAL QUESTIONS.

First. Did the Southern Pacific Railroad Company have any alienable or contractual interest in the lands described in the contracts of sale?

The answer to that question involves the construction of

1. Act of Congress of July 27, 1866, entitled "An Act granting lands to aid in the construction of a Railroad and Telegraph line from the States of Missouri and Arkansas to the Pacific Coast."¹⁴

¹⁴Stat. at Large, p. 292.

2. The order of the General Land Office of the United States of August 15, 1887,¹⁵ revoking its prior withdrawal of said lands from private entry pending the Railroad Company's contingent right of selection for indemnity, and now restoring lands to the public domain for the usual sale and settlement thereof.

Second. Were the lands in the contracts described any "part of a grant of lands to the Southern Pacific Railroad Company by the Congress of the United States?"

The answer to that question involves the construction of the Act of Congress of July 27, 1866, before mentioned.

Third. Was not the before mentioned order of the General Land Office revoking the withdrawal for railroad indemnity selection and subjecting the land to private entry a "final determination" that patents for that land would not issue to the Southern Pacific Railroad Company under the Act of July 27, 1866?

The answer to that question involves the construction of

1. The Act of July 27, 1866, the order of the General Land Office mentioned, and

2. Acts of Congress granting or bearing upon the grant of authority to the General Land Office to make such withdrawals and restorations of

¹⁵Trans., folio 40.

lands within railroad indemnity limits, as follows:

Act of April 21, 1876,¹⁶ (Sec. 1), entitled "An Act to confirm pre-emptions and homestead entries of public lands within limits of railroad grants, where such entries have been made under regulations of the Land Department."

Act of Jan. 13, 1881,¹⁷ entitled "An Act for the relief of certain settlers on restored railroad lands."

Act of March 3, 1887,¹⁸ entitled "An Act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads," etc.

Sec. 2218 of Revised Statutes of United States.

RELATION OF FEDERAL QUESTIONS TO THE CASE.

First. As to the seller's lack of alienable or contractual interest in the lands:

1. If (as we contend the fact to be) the Railroad Company was a stranger to—had no *vested interest* in the lands, the promises of the buyer were (a) void *ab initio*, or (b) voidable, *i. e.*, unenforceable against him at any time prior to the seller's acquisition of title.

2. If (as we contend the fact to be) the seller

¹⁶19 Stat., 35. ¹⁷21 Stat., 315. ¹⁸24 Stat., 556.

had no *marketable* title to the lands, this action against the buyer for specific performance on his part could not be sustained.

Second. As to the seller's misrepresentation of title:

1. If (as we contend the fact to be) the lands in the contracts described were not "a part of a grant of lands to it by the Congress of the United States" the seller, by declaring in the contracts that those lands were a part of such grant, misrepresented its title and thereby made the contracts voidable or, at least, unenforceable under the provisions of the California Civil Code.

Third. As to the effect of the restoration of the lands to the public domain:

1. If (as we contend the fact to be) the order of the General Land Office restoring the lands to the public domain for private entry was in effect a refusal of the Railroad Company's claim to them, and a final determination that patents for them would not be issued to that Company, the contracts had by their own terms expired.

"First, 1, *a* and *b*."

"A mere possibility, not coupled with an interest, cannot be transferred."

Sec. 1045 of Civil Code of California.

That section is a codification of the common law rule, save that it applies to law and equity alike.

The rule is illustrated in a recent case in this Court where it appeared that the plaintiff in the trial Court had selected and applied for the purchase from the State of Texas of more than a million acres of land at the price of fifty cents an acre, and soon thereafter had contracted with defendant to convey to him all his rights to the lands at an advance of twenty-five cents an acre. The action was to recover that advance price. This Court found that at the time of the contract the seller had yet acquired no vested interest in the lands and, therefore, no assignable estate. The Court said:

“The claim, therefore, of having acquired any right or title in or to the whole amount of the lands by the proceedings taken was manifestly groundless. The plaintiff below could not convey any proprietary interest in the whole amount of the lands desired until the required payment therefor was made [to the State], and any promise by the defendant below, Telfener, to pay to him twenty-five cents, or any amount, for an acre of *such hoped-for, and not acquired*, land, or for any less quantity, was worthless, without any value or consideration.” * * *

“The claim that the plaintiff below, Russ, had parted with a valuable property, for which he was entitled to a judgment exceeding half a million of dollars from Count Telfener, for having transferred to him *his hopes of securing a million acres of land from the State*, for which he did not hold any promise or obligation of the State, does not merit consideration. As a claim it rests upon no solid foundation.”

We need not dilate upon that point.

“ 2.”

“ An agreement for the sale of property cannot be specifically enforced in favor of a seller who cannot give the buyer a title free from reasonable doubt.”

Sec. 3394 of Civil Code of California.

That section, also, is a codification of the common law, and is here cited only to show the fixed rule in California.

We need refer to but one case in this Court:

“ The legal title to these lots is therefore still in the bank, and may be subject to the trust declared in the deed, from anything that appeared upon the trial. And to allow the bank to recover the purchase money, and turn the defendant over to a court of chancery to obtain title, would be going farther than any known principles in Courts of law would warrant. * * * To substantiate the present action under such circumstances, would be compelling the defendant to take a lawsuit instead of the land for which he contracted.”

Bank etc. v. Hagner, 1 Pet., 455, 468.

California adjudications are of course controlled by the Section of the Civil Code cited, but we append a couple of illustrative cases:

Sanders v. Lansing, 70 Cal., 429;

Burks v. Davies, 85 Cal., 110.

"Second, 1."

"Specific performance cannot be enforced against a party to a contract in any of the following cases:"

"1. If he has not received an adequate consideration for the contract.

"2. If it is not, as to him, just and reasonable.

"3. If his assent was obtained by the misrepresentation," etc.

Sec. 3391 of Civil Code of California.

"Third."

The point that the contracts had by their own terms expired, needs only an explanation. The contracts declare that as the Railroad Company's claim to the lands may not be recognized by the United States, it will upon final determination that patents for the lands will not issue to it, return to the buyer all moneys paid on account of the purchase. The lands were outside the granted limits, but within the indemnity belt withdrawn from private entry in 1867 by the Secretary of the Interior to meet the contingent selection of the Railroad Company under direction of the Secretary of the Interior. But in 1887 the lands were restored to the public domain and to right of private entry. And that restoration was, we claim, a refusal of the Secretary of the Interior to approve the selection by the Railroad Company of those lands as indemnity under the Act of Congress of July 27, 1866, and a final determination that patents for them would not issue to the Com-

pany. Of course if it was such a determination the contracts by their express terms became thereby revoked, and the buyer entitled to a return of his money.

None of the foregoing Federal questions were formally mentioned in the opinions by the California Supreme Court rendered. Indeed that Court was precluded from entertaining them, since the judgment of the trial Court, affirmed by the appellate Court, in finding that the lands "were granted to plaintiff by an Act of Congress of the United States * * * approved July 27, 1866," and "that plaintiff is the owner of said lands in fee under the provisions of said Act of Congress," and that "plaintiff is ready to perform said contracts," left no basis for those questions.

Thus far our presentation of the case has been confined to the Federal questions necessarily involved in, and their relation to the judgment here under review; whether passed upon correctly or incorrectly by that judgment will be presented in their order among all the questions arising in the case.

THE WHOLE CASE AND QUESTIONS INVOLVED.

The complaint alleged \$4,343.19 to be due as *interest* on part purchase price (not then due) of land, and asked that in case that interest be not paid within thirty days the buyer be barred of all right in the lands under the contracts of purchase, and the contracts annulled. Nothing was said about the money paid on account of purchase, asking its forfeiture, nor offering its return. By the contracts alleged, the Southern Pacific Railroad Company in form agreed to sell lands it did not own, *in the event only* of it becoming the owner through patents from the United States. Expressly provided that it should not be held bound to acquire the lands nor title to them from any source, and that in case it was finally determined that the United States would not give it patents the trade would be "off," such moneys as had been paid returned, and the contracts "be null and void." The time or manner of the determination that patents would not issue to the Railroad Company was not expressed, but the entire purchase price must be paid, and the transaction closed within five years from the date of the contracts.

The buyer, answering the complaint, consented to the annulment of the contracts on condition

that \$6,618.25 paid by him on account of those contracts be returned. The judgment followed the prayer of the complaint.

Our points for reversal or modification may be epitomized thus:

1. The complaint, and the case made under it, showed at most a cause of action for *rescission* of the contracts. Non-payment of interest on non-due balance of purchase price gave no other relief.

2. As an action for "foreclosure" or specific performance of contract, it could not be sustained:

a. Because "the seller could not give the buyer a title free from reasonable doubt."

b. Because there was no mutuality of remedy; the seller could not be forced to convey.

c. Because of misrepresentation of title by the seller, the contracts declaring the lands to be a "part of a grant of land to it by the Congress of the United States."

3. The contracts were without supporting consideration for the promise of the buyer, and thus void *ab initio*:

a. The seller had no assignable, *i. e.*, vested interest in the lands.

b. The seller made no absolute promise to sell, and hence the engagements were not bilateral—a promise for a promise—and as unilateral engagements to buy, they had no extrinsic support.

4. The contracts were voidable at the instance of the buyer at any time before the contingent promise to sell became absolute by procurement of patents. The promise of the buyer was at most a continuing offer to buy, subject to recall at any time before being met by an absolute promise to sell.

5. The contracts expired by the limitation of time within which the seller must acquire the lands so as to be enabled to convey them to the buyer at the date fixed for final payment of purchase price:

a. By the passage of the time within which the entire purchase price must have been paid, without the ability of the seller to convey or give possession of the lands so to be paid for.

b. By the passage of more than a reasonable time within which to procure lands and title, assuming that no time for such procurement was by the contracts expressed or implied.

6. The contracts had by their own terms expired, it having been finally determined that patents would not issue to the Railroad Company:

a. By the order of the Secretary of the Interior in restoring the lands to the public domain subject to private entry.

b. In contemplation of the requirements of the contracts as to final payment of purchase price.

I.

Non-payment of interest, alone, gave no cause of action for forfeiture or foreclosure of the contracts of purchase, nor for anything else save a rescission or, possibly, a money judgment for amount due.

The principal (balance of purchase price) was not yet due, and there was no provision in the contracts, nor in law, making it due because of non-payment of interest.

Indeed, to the contrary, the contracts provided a penalty of their own for non-payment of interest—loss of right of intermediate possession of the lands.¹⁹ And that penalty must be held exclusive.

In California even a mortgage cannot be foreclosed until the principal debt has, under the express terms of the instrument, become due. Non-payment of interest does not, of itself, make the principal due.

Van Loo v. Van Aken, 104 Cal., 269.

Neither jurist nor law writer has ever declared or intimated that a contract of purchase may be "forfeited" or "foreclosed" because of non-payment of interest on non-due purchase price of the land.

¹⁹Trans., Fol. 24. And—as if in anticipation of the default—the penalty was in fact imposed: for the buyer had been unable to get possession of the lands. Fols. 29, 39.

Of course, the seller may *rescind* for any breach of the buyer, but in that case he must return everything received under the contract. The decree in this case fits as well a rescission as a forfeiture or foreclosure, save that it does not require a restoration of the buyer's money.

II a.

An action to compel the buyer's performance of a contract of purchase of land, directly or indirectly, by "forfeiting" or "foreclosing" his rights under the contract, cannot be maintained while the seller is without marketable title to the land.

"An agreement for the sale of property cannot be specifically enforced in favor of a seller who cannot give the buyer a title free from reasonable doubt."

Sec. 3394 of Civil Code of California.

The contracts here were made and to be performed and are sought to be enforced in California.

That the Railroad Company's title to the lands were not "free from reasonable doubt" will hardly be questioned in this Court. Conceding (argumentatively) all the Company claims, yet it appears that title and possession remained in the United States. For, as this Court declared in

Ryan v. C. P. R. R. Co.,²⁰ repeated with emphasis in United States v. Missouri Ry.,²¹ and announced as an unquestioned principle in N. P. R. R. v. Musser etc. Co.,²² the title to land within the Railroad indemnity belt remained *undisturbed* in the United States until properly selected by the Railroad Company, and that selection approved by the Secretary of the Interior.

Indeed, under this point, we need not go beyond the contracts themselves. They declare that the Railroad Company had no title, would not engage to get title, might be unable to get it, and that when finally determined that title could not be acquired in a designated way, the agreements for sale of the lands should become void.

II b.

This action cannot be maintained, because of lack of mutuality of remedy. The buyer cannot be compelled to buy or pay, because the seller cannot be compelled to sell or convey.

“Neither party to an obligation can be compelled specifically to perform it, unless the other party thereto has performed, or is compelable specifically to perform everything to which the former is entitled under the same obligation, either

²⁰99 U. S., 382. ²¹141 U. S., 358. ²²168 U. S., 604.

completely or nearly so, together with full compensation for any want of entire performance."

Sec. 3386 of Civil Code of California.

"It is universally admitted that equity will not enforce a contract, where the party asking its enforcement cannot himself be compelled to perform it."

Cooper v. Pera, 21 Cal., 404-11;

Sturgis v. Galindo, 59 Cal., 28;

Makeham v. Parker, 82 Cal., 46-49;

Smith v. Taylor, 82 Cal., 533;

Oullahan v. Baldwin, 100 Cal., 648-54;

Easton v. Millington, 105 Cal., 49;

Barnbury v. Arnold, 91 Cal., 606;

Lattin v. Hazard, 91 Cal., 87.

The last named case is very apposite. A right of way, land for depots, etc., was agreed to be conveyed to a street railway corporation, which in return agreed to construct the road, equip and operate it in a specified way at specified rates for a period of not less than ten years. The road was constructed, equipped and operated as agreed for some years, but before the expiration of the ten years the action was brought to specifically enforce the agreed conveyances. In denying the Railway Company's right to specific performance the Court said:

"The agreement that McLaughlin will operate the road for the stipulated period in the mode agreed upon is a substantial and important part

of the obligation which has not been performed, and of which specific performance cannot be enforced by a decree."

In our case the essential consideration for the buyer's promise to pay was the seller's promise to convey, and no one can suppose that the latter promise can be enforced by a decree. The seller could not convey with or without the spur of a decree.

If it be said that the seller did not promise to convey; that its only absolute promise was to "use ordinary diligence to procure patents," still even that little promise can not be specifically enforced by a decree of Court.

"It is immaterial what constitutes the want of mutuality, whether resulting from personal incapacity, from the nature of the contract, or from any other cause. Whenever the absence of the essential element is ascertained to exist on the part of one of the contractors, and for that reason is incapable of being enforced against him, he will be equally incapable of enforcing the contract against the other party."

Waterman's Spec. Perf. of Cont's, sec. 196.

For illustrations, see

Ib., secs. 197-98;

2 Beach Mod. Eq. Juris., sec. 586, notes;

Fry's Spec. Perf., sec. 286, Am. notes;

Putnam v. Grace (Mass.), 37 N. E., 166;

Maynard v. Brown, 41 Mich., 298;

Pingle v. Conner, 66 Mich., 187-93;

Bean v. Burbank, 16 Me., 458;
 Bolles v. Sachs, 37 Minn., 315;
 Chicago, etc. v. Dane, 43 N. Y., 240;
 Raffalowski v. Am. Tob. Co., 73 Hun., 87;
 Miers v. Franklin, 68 Mo., 127;
 Campbell v. Lambert, 36 La. An., 35.

II c.

“Specific performance cannot be enforced against a party to a contract in any of the following cases:

- “ 1. If he has not received an adequate consideration.
- “ 2. If it is not as to him just and reasonable.
- “ 3. If his assent was obtained by the misrepresentation,” etc.

Sec. 3391 of Civil Code of California.

In response to the buyer's defense of misrepresentation of title, the trial Court found:

“That no representations were made by plaintiff to defendant which induced him to enter into the said contracts other than, or different from the facts as the same are recited in said contracts, and said facts as therein recited are true.”

But it is the very recitals of the contracts that contain the misrepresentation of title. They declare “that the party of the first part claims all the tracts hereinbefore described as part of a

grant of lands to it by the Congress of the United States." And these lands were no part of the grant made by the Act of July 27, 1866. The lands by that Act granted were the odd numbered sections within twenty miles (in States) on each side of the railroad. The Act plainly intended to limit the subsidy to twenty sections per mile of road, and as the loss to be met within those granted sections by prior alienation could not be then known, to have *granted* the odd sections of the indemnity belt would have been to absolutely increase the intended subsidy by fifty per cent, although the losses intended to be compensated for might not exceed ten per cent of the intended subsidy.

The phrase "lands hereby granted" in Sec. 6 of the Act mentioned has been many times construed by the department having special charge of the matter as meaning the lands within the "primary" or "granted" limits.

6 Dec. of Dept. of Int., 535;

7 ib., 240;

11 ib., 610.

And that construction has been necessarily approved by this Court in its many decisions holding that Railroad Companies had no claim to any part of the indemnity belt until selected by that Company and the selection approved by the Secretary of the Interior.

The form of contracts here used was that prepared apparently for granted lands to which patents had not yet issued, and of course do not fit a contract of sale of lands to which the seller had no legal claim or title. Of course that misrepresentation was a very material one. If part of a grant, the title to the lands had already passed to the Railroad Company, and patents would be merely additional and convenient record evidence of the transfer of title, and one might readily part with his money in return for such an assurance of title, although unwilling to advance a cent in exchange for what this Court has called "such hoped for but not acquired land," as the seller's claim to any special sections of the indemnity belt offered.

Such a misrepresentation of the seller would not only prevent specific performance against the buyer, but was ample cause for the rescission prayed for in his cross-complaint.

III a.

The seller had no assignable nor vested interest in the lands.

The subsidy to the Southern Pacific Railroad Company under the Act of Congress of July 27, 1866, consisted of a present grant of all odd numbered sections within twenty miles, on each side, of the required railroad. In case of the prior

alienage of any of the lands so attempted to be granted, the Railroad Company might, under direction of the Secretary of the Interior, select from odd numbered sections within ten miles of the granted land an area equal to that so lost from the grant. The road was required to be constructed and accepted in twenty-five mile sections, and patents to issue only for lands opposite to, *coterminous with*, and earned by each completed section. The route of the road was from the Eastern boundary of California, Northerly and Westerly to the City of San Francisco, and the road itself was required to be completed by July 4, 1878. It was not completed at that date—is not yet completed.

In April, 1867, a proclamation of the Secretary of the Interior described an indemnity belt to be withdrawn from private entry to meet possible claims of Railroad for lands in lieu of grant losses.²³

In August, 1887, the order of withdrawal was revoked and the lands restored to the public domain for private entry.²⁴

At that time the Railroad Company had been over nine years in default as to completion of the road, and their grant of lands subject to forfeiture.

The contracts here in question were made in February, 1888, a few months after the restoration of the lands to right of private entry.

²³Dec. Dept. of Int. ²⁴6 Ib., 84-92.

In September, 1890, Congress passed a general Act forfeiting all land grants to Railroad Companies not then earned.²⁵

The record of this case is silent as to what, if any, portions of the required railroad from the Eastern boundary line of California to San Francisco had been completed at time of restoration of lands to public domain, and at time of passage of general forfeiture Act. Indeed the record does not disclose the performance of a single act of the many required to earn either granted or indemnity lands. The only relation of the Railroad Company to the lands as per record is that they are situated within its indemnity belt, once withdrawn from, but afterwards restored to private entry; "that patents or a patent therefor have not yet been issued to plaintiff by the Government of the United States; that it has not been finally determined that patents or a patent shall not issue therefor, or for any part thereof, but proceedings are now pending before the proper Department of the Government of the United States, instituted by plaintiff, to obtain patents or a patent for said lands and premises, and the whole thereof."

Reading that declaration with all its possible implications in favor of the Railroad Company, the statement that proceedings to obtain patents were then pending, and that it had not been

²⁵26 Stat., 496.

"finally determined" that patents would not issue, may be enlarged into the statement that the Railroad had selected or applied for the selection of the lands in indemnity for like lands within granted limits lost to it, and that that selection or application had not been "finally rejected."

That was the situation at the time of the trial—what was it at the time of the execution of the contracts? Did any of the conditions giving the Railroad Company the right of selection of these lands then exist? Had the Company then selected or applied for the selection of these lands as indemnity. Is it credible that such an application could have been made before February, 1888, and not "finally determined" in October, 1893?

But giving every implication, guess, and surmise to the Railroad Company, we still have left us the very pertinent fact that the Railroad Company's application for—its attempted selection of the lands as indemnity had not up to the date of the trial been approved by the Secretary of the Interior. That much has always been conceded by the Railroad Company.

It follows, of course, that when the contracts were executed, and up to date of trial of action, the seller had no vested interest in the lands contracted to be sold. For (and ignoring for the moment the restoration of these lands to the public domain for private entry) no feature of Con-

gressional grants as subsidies to railroad companies has been so firmly fixed by the numerous and uniform adjudications of this Court as that.

The right of a railroad company to any special parcel of land within the indemnity belt is *initiated* by the Company's *selection* of that parcel as indemnity and the *approval* of that selection by the Secretary of the Interior.

That principle, first announced in *Ryan v. Central Pac. R. R. Co.*,²⁶ was repeated frequently up to *Wisconsin Ry. Co. v. Price County*,²⁷ where all prior cases are reviewed, "re-affirmed" (words of syllabus) in *United States v. Missouri etc. Co.*,²⁸ and adhered to in *North Pacific R. R. Co. v. Musser etc. Co.*,²⁹ the latest expression of this Court on the subject.

"Until the selections were approved there were no selections in fact, only preliminary proceedings taken for that purpose; and the indemnity lands remained unaffected in their title. Until then the lands which might be taken as indemnity were incapable of identification; the proposed selections remained the property of the United States. The Government was, indeed, under a promise to give the Company indemnity lands in lieu of what might be lost by the causes mentioned. But such promise passed no title, and, until it was executed, created no legal interest which could be enforced in the Courts."

²⁶99 U. S., 282. ²⁷133 U. S., 496. ²⁸141 U. S., 375. ²⁹168 U. S., 604, 611.

Wisconsin C. R. v. Price County, 133 U. S., 511, as quoted, and expressly reaffirmed in United States v. Missouri etc. R., 141 U. S., 375, 376.

"Neither is it intended to question the rule that the title to indemnity lands dates from selection and not from grant."

N. P. R. R. v. Musser etc. Co., 168 U. S., 607.

The result of these considerations (even without that of the effect of the order restoring the lands to the public domain for private entry) is, we think, to negative the possibility of the seller of the lands described in the contracts having any vested or assignable interest in them. Compare the situation here with that in *Telfener v. Russ*.³⁰

Here we find at most a promise from the United States to give the Railroad Company such lands as it may, with the approval of the Secretary of the Interior, select. Then a selection by the Company, but a disapproval by the Secretary.

In the *Russ* case we see a promise by the State of Texas to sell to an applicant such lands as he shall have selected, surveyed, and applied for in a designated manner. Then a selection, survey, and application to purchase described lands in the manner required.

In the latter case this Court said that the applicant there "could acquire no vested interest, that

³⁰162 U. S., 170, 176, 183.

is no legal title to it until the purchase price was paid and the patent of the State was issued to him." In our case this Court has said: "But such promise passed no title, and until it was executed, created no legal interest which could be enforced in the Courts."

Had not Russ more nearly approached a contract capable of being specifically enforced against the State of Texas, than had the Southern Pacific Railroad Company one capable of being so enforced against the United States? Indeed to weaken the Texas case down to the base of ours Mr. Russ should have stated in his contract that as he sometimes failed to get patents from the State despite his apparent right thereto, he would not in this case guarantee a patent or be responsible for the refusal of the State to recognize the validity of the application. It should have also appeared that the proper officer of the State of Texas had *refused* the applications. Then the situation in the two cases would be similar. And here, as there, the Court might say: "Any promise by the defendant below to pay to him twenty-five cents, or any amount, for an acre of *such hoped for, and not acquired land*, or for any less quantity, was worthless, without any value or consideration."

In addition to the foregoing considerations we contend that the act of the Secretary of the In-

terior in revoking the reservation of the lands for indemnity purposes and restoring them to the public domain, severed any connection theretofore possibly existing between land and Railroad Company and left the two utterly unrelated. The force and effect of that act of the Secretary of the Interior is discussed under point VI a, post.

III b, and IV.

There was no promise to sell in support of the promise to buy.

The promise to sell was to become effective only in case the United States gave the Railroad Company patents for the lands. And the Company expressly negatived any obligation on its part to procure, and any responsibility for failing to procure patents.

In form the contracts present an agreement to sell and buy—a bilateral executory contract where the one promise should support the other.

“An agreement to sell and buy is a contract by which one engages to transfer the title to a certain thing to another, who engages to accept the same from him and to pay a price therefor.”

Sec. 1729 of Civil Code of California.

The contracts here do not engage to transfer the title. The sale was to be made on a contingency;

on conditions stated to be beyond the control of either party, and on the happening of an event which might never happen—a common wager contract, in fact.

And a bilateral contract depends for its validity upon two absolute promises, one supporting the other.

“In a bilateral contract both parties must be bound at the same time or neither is bound.”

Wald's Notes to Pollack's Contracts, p. 13.

“A promise is not a good consideration for a promise unless there is an absolute mutuality of engagement, so that each party has the right at once to hold the other to a positive agreement.”

1 Parson's Cont., *p. 449.

“It (the promise) must not be illusory or dependent upon a contingency, which in fact reserves an unlimited option to the promisor.”

3 Am. & Eng. Ency. of Law, 845;

Pollack's Contracts, 44;

Clark's Contracts, 168.

“Mutual promises are concurrent considerations and will support each other unless one or the other be void; in which case, there being no consideration on the one side, no contract can arise.”

Story's Contracts, Sec. 447.

The word “void” in that connection means unenforceable.

Siddall v. Clark, 89 Cal., 321.

Test: Could the buyer at any time during those long years have had a specific performance of—of what? Of the seller's engagement? The question itself gives answer! There was no engagement. No patent, no promise. Does the seller promise to get patent? No. Says it may not get them, and that, therefore, its promise to sell, if it procures patent, shall not be construed a "guaranty or assurance that patent or title will be procured."

"The record discloses the existence of an executory contract. It is said to be an elementary principle that to render an executory contract valid both parties must be bound. *Rathbone v. Warren*, 10 John., 587. Now it will be seen that it is provided in this instrument under seal that this lease shall not be binding on the said King, in any way, until the said King shall be appointed to, and installed by the proper officers of the Baltimore & Ohio Railroad Company as freight and ticket agent of the said company at Breathedsville station in Washington County, Maryland, on the Washington County branch of the Baltimore & Ohio Railroad." It is thus apparent that the appellant is entirely free from any and all obligations to be created by this instrument under seal until the happening of an event which has not occurred. The question then to be determined is whether the appellees are bound by a contract during the period while the other party remains exempt from all obligation, and could not be sued for any alleged infraction. No such principle has ever been sanctioned by adjudication when the terms of the contract impose mutual obligations. On the contrary, the Court has said that "it is cer-

tainly necessary to set out in the declaration a contract binding on both parties, when a suit is instituted to recover damages for the non-performance of the contract.' *Berry v. Harper*, 4 Gill & J., 470; *Lamar v. McNamee*, 10 Gill & J., 120. And in *Routledge v. Grant*, 3 Carr. & P., 267, Best, J., emphatically says: 'It is not just that one party should be bound when the other is not.'

"It is manifest that this is one of those legal principles so well established as to be beyond the scope of controversy. The proper construction of this executory contract is that it was to become binding on both parties when the appellant obtained the appointment he was seeking to obtain. It would become operative as soon as the contingency happened, and not before. As that contingency which was dependent on the action of third parties has not happened, the appellant is free from all obligations, and is, therefore, in no position to maintain a suit against the appellees for an alleged non-performance of a contract by which he is not bound in any respect. He cannot at his own option now impose on them obligations not created by the instrument under seal. As was said by Chancellor Johnson in *Duvall v. Myers*, 2 Ind. Ch., 405: 'A party not bound by the agreement itself, has no right to call upon the judicial authority to enforce performance against the other contracting party by expressing his willingness to perform his part of the agreement. His right to the aid of the Court *does not depend upon his subsequent offer to perform the contract on his part*, when events may have rendered it advantageous to do so, but *upon its original obligatory character*.'"

King v. Warfield, 67 Md., 246-8-9.

The contracts containing but one absolute promise (the buyer's), that engagement was uni-

lateral and, being without supporting consideration, void, or, at least, unenforceable and subject to revocation at any time before the seller's contingent engagement became absolute by receipt of the patents.

"In a bilateral contract both parties must be bound at the same time, or neither is bound. In a unilateral contract the offeree is not bound to perform at all, nor until performance by him is the offerer bound; but upon performance by the offeree the proposal of the offerer is converted into a binding promise. Thus if A promise B to pay him a sum of money if he will do a particular act, and B does the act, the promise thereupon becomes binding."

Wald's Notes to Pollock's Cont., p. 13.

"Until the conditional promise be rendered binding by the act or time on which it is conditional, it may be retracted."

1 Story's Cont., Secs. 569, 572.

"If A promises B to pay him a sum of money if he will do a particular act, and B does the act, the promise thereupon becomes binding, although B at the time of the promise does not engage to do the act. In the intermediate time the operation of the contract or promise is suspended; for, until the performance of the condition of the promise, there is no consideration, and the promise is *nudum pactum*."

Matthewson v. Fitch, 22 Cal., 86, 93-4.

And see

Richardson v. Hardwick, 106 U. S., 252, 255.

The California Supreme Court appears to have accepted those views, so far as the promises to buy and to sell and their consequences are concerned, but decided that the promise to pay was an independent covenant, disconnected with the matter of final purchase or sale, and to be performed in any event, patents or no patents, conveyance or no conveyance; and that, although the uncertain and unenforceable promise to sell would afford no consideration for that independent absolute covenant to pay, the latter was supported by extrinsic and independent considerations, as follows:

"Plaintiff, by its contract, surrendered its right to contract with or sell to any one else, and yielded to defendant the present right of possession which it claimed. These concessions were clearly a detriment to plaintiff, and, in a legal sense, an advantage to defendant; and they therefore furnished a consideration for defendant's promise to pay."³¹

The opinion of the California Court presents that theory of consideration as plausibly and strongly as it is capable of being stated, but, we suggest:

The *premises* are unfounded in (1) that plaintiff below did not (*a*) expressly, nor (*b*) impliedly, surrender its right (?) to contract with or sell to any one else than defendant; nor (2) claim any right to the present possession of the lands.

Also, that, *assuming* the correctness of those

³¹Trans., p. 17.

premises, the conclusions of the Court are faulty, since those assumed acts would afford no consideration for defendant's promise to pay any part of the purchase price of the lands.

1. Surrender of plaintiff's right to sell to other than defendant:

a. There is no express surrender.

b. Such a surrender is sought to be implied as the necessary result of plaintiff's agreement to sell to defendant. But plaintiff did not agree to sell to defendant. The entire theory of the case, even as treated by that Court, says that plaintiff did not agree to sell the lands. If plaintiff had agreed to sell to defendant, what occasion was there—why this endeavor—to find another and extrinsic consideration for the promise to pay for the lands? An agreement to sell would of itself afford an ample and a legitimate consideration for the promise to pay the price. And, of course, if there was no valid or enforceable agreement to sell to defendant, there was no implied agreement to sell to none other. An unenforceable agreement will no more support a legal or enforceable implication than it would afford a consideration for a counter-promise.

2. Plaintiff below did not claim any right to the present possession of the lands:

a. No such claim is anywhere expressed in the contracts or in the case made. To the contrary,

the contracts very plainly repudiate such claim. They say:

"That said lands being unpatented, the party of the first part does not guarantee the possession of them to the party of the second part, and will not be responsible to him for damages or cost in case of his failure to obtain and keep such possession."

b. No such claim can be implied. The only thing affording such implication, even remotely, is plaintiff's expressed permission that defendant might take such possession; but that possible implication is destroyed when, after the permissive clause of the contracts, we read their further declaration last above quoted (which in turn implies that its right of possession, as well as every other right relating to the lands, depended upon its procurement of patents), and consider that in fact the plaintiff had no right to the then present possession of the lands, whether it ever got patents for them or not.

But even assuming that plaintiff below did surrender to defendant its (now-claimed) right to sell to another, and did yield to him its (now-claimed) right of present possession of the lands, neither, nor both of these concessions afford a consideration for defendant's promise to pay. To sustain that proposition it must appear—and it will be sufficient if it does appear (1) that plaintiff had no legal power to sell or contract for the sale of

the lands to anybody, or (2) that it had no right to the then possession of the lands. Either of these established and it follows that the "concessions" were utterly ineffective either to prejudice the plaintiff or benefit the defendant, and, therefore, constituted no consideration for defendant's promise to pay the purchase price of lands not yet agreed to be sold.

What will constitute a consideration for a promise?

Not an unenforceable promise.

Siddall v. Clark, 89 Cal., 321.

Nor an illusory or ineffective promise or act; "some *real* benefit must be conferred on the promissor, or some *real* detriment suffered by the promisee."

Clark's Contracts, p. 164;

Powers v. Chabot, 93 Cal., 266;

Central L. & M. Co. v Center, 107 Cal., 193.

While in mere support of a promise it need not be, yet to warrant a specific performance of that promise (such as is here sought) the consideration must be adequate, *i. e.*, practically equivalent in value to the promise.

Sec. 3391 Civil Code of Cal., before cited.

Governed by these rules, did the Railroad Company's concessions constitute a sufficient consid-

eration for Allen's promise to buy and pay so many thousands of dollars?

The "concessions" are declared to consist of a surrender of the Company's right to sell specified lands to other than Allen, and its yielding to Allen its right to the present possession of those lands.

But we submit that it has sufficiently appeared that the Railroad Company neither agreed to sell, nor had any legal power to sell the lands to anybody. Its engagement with Allen, therefore, was no detriment to it, nor advantage to Allen.

The Railroad Company's lack of present right of possession of the lands is still more apparent. And so its surrender of such now-claimed right could have been of no possible detriment to it, nor advantage to Allen. It may be remembered that the latter never got possession of the lands.

Indeed, we have but to compare the Railroad Company's theory of consideration in this case with the views by this Court expressed in *Telfener v. Russ* to perceive its weakness. There Russ had taken the required proceedings, and had necessarily expended much money in locating and surveying the lands; here the Railroad Company had done absolutely nothing but wait apathetically for patents—patents for *some* lands, these or others in lieu of claimed losses from its grant.

V.

**The contracts expired by limitation of time
for procuring title.**

a. The contracts require payment of balance of purchase price at the expiration of five years from their date.

Under the usual rule requiring payment and conveyance to be concurrent acts, the seller must have been prepared to convey at the expiration of that fifth year.

And as the contracts, in providing that they should be void and any money paid returned when it should be "finally determined" that the seller would not get patents, did not state what should constitute such "determination," they must be construed and controlled by the above considerations—the necessity of procuring title to meet the payment—and, therefore, as impliedly declaring that the passage of five years without receiving patents would be a "final determination" that they would not be given the seller.

That argument is based upon the covenants of sale and purchase being interdependent, and the acts of payment and conveyance concurrent in time, or, at least, so far mutual obligations that payment could not be enforced when it affirmatively appeared that conveyance could not be made.

In apparent acquiescence in that argument, the Supreme Court of California, in support of its judgment, held that the covenants were independent to an extraordinary extent; that the buyer must at the termination of the five years pay in full, although it then appeared that the seller was without title or assurance, and could neither make conveyance nor give possession to the buyer!

The question of dependent or independent covenant in a contract of sale has hitherto been a merely technical, not to say trifling matter. Must it appear by pleading or proof that the plaintiff tendered price or deed, or only that he was ready with price or deed? Courts have differed on that question, but we know of no case nor comment holding or suggesting that in such cases it is not absolutely essential that it appear that the moving party was *ready* to perform upon performance by the other party. Even in this case the pleader was aware of the indispensibility of the requirement, and therefore alleged plaintiff's ownership of the land, and its willingness and readiness to convey. The evidence, of course, overthrew the allegations of the pleading, and the Court passed upon the case made, and not the case alleged.

So that the point here in review is whether a seller may enforce payment from the buyer in a case where the seller has not yet got the thing sold, may never get it, and expressly repudiates

any obligation to get it, or to give it to its buyer?

The proposition involved in an affirmative answer to that question is, in the abstract, most extraordinary, and when applied to business transactions, especially to the transaction here, seems so monstrously unjust, so absurdly unequal in its operation on the parties, that its very announcement should be its refutation.

- 1. In the absence from the contracts of an express and clear provision to the contrary, the seller must, either before, or at the time of, or immediately following the payment in full of the purchase price, convey to the buyer the thing bought.**

The California Civil Code seems to make delivery a condition precedent to payment:

"An agreement to buy is a contract by which one engages to accept from another, *and* pay a price for the title to a certain thing."

Sec. 1728.

"An agreement to sell and buy is a contract by which one engages to transfer the title to a certain thing to another, who engages to accept the same from him, *and* to pay a price therefor."

Sec. 1729.

"An agreement to sell real property binds the seller to execute a conveyance in form sufficient to pass the title to the property."

Sec. 1731.

Those sections contemplate the delivery to be the first act, but in any event the two acts of delivery and payment must be practically concurrent.

"In contracts of this description the undertakings of the respective parties are always considered dependent unless a contrary intention clearly appears. A different construction would in many cases lead to the greatest injustice, and *a purchaser might have payment enforced upon him, and yet be disabled from procuring the property for which he had paid.*"

Bank etc. v. Hagner, 1 Pet., 455, 465-6.

This Court (over which Chief Justice Marshall then presided) seemed to consider the latter possibility sufficient argument as *reductio ad absurdum*.

That case was quoted, and its rule followed in California before the adoption of the Codes.

Hill v. Grigsby, 35 Cal., 656, 662.

2. There is an entire absence from the contracts of any *express* provision, clear or otherwise, that the lands need not be conveyed when the balance of the purchase price is required to be paid.
3. The contracts do not, clearly or otherwise, indicate that the lands need not be conveyed contemporaneously with the enforced payment of the balance of the purchase price.

The contracts contain nothing from which we may surmise, much less infer, that the buyer must

buy and pay for in full at the termination of five years, but that the seller need not sell or convey at that time, nor at any specified or defined time, nor at any time which is practically capable of being determined or limited, although boldly so claimed by the defendant in error.

To the contrary, the contracts plainly indicate that the final payment shall be withheld, as in suspense, until it be known *whether the seller can convey at all, or be under any obligation to convey; and that the period of that suspense shall be five years.*

In the construction of a contract, any ambiguous or doubtful provision will (1) be resolved against the maker of the instrument,³² (2) the provision will be given a reasonable and fair operation as to the parties and subject-matter,³³ and (3) for that purpose all things by law or usage considered as incidental to a promise and its fulfillment, will be implied and read as if forming a part of that promise.³⁴ The parties to a contract will be assumed to be intelligent as to their respective interests as therein involved, and prudent and alert to protect them. We cannot, however, assume that they—especially he who signs a contract in form already prepared by the other party—will always clearly express his intent and ex-

³²Civil Code, Sec. 1654. ³³Ib., Sec. 1655. ³⁴Ib., Sec. 1656.

pectation as to incidentals which he thinks necessarily follows the main promise. The observation of every lawyer and judge forbids such an implication; for the great majority of litigated cases grows out of the omissions in contracts of just such intent and expectation of one or the other of the parties. Indeed it is because of that very condition of things that the rule declared in said Sec. 1656 was adopted.

The average or representative man buys land either for improvement and use, or for barter. For either purpose it is essential that he have the land. And when he buys and pays for it he expects to get it. Indeed it is the universal expectation, not alone of buyers, but of the public generally, that one gets what he has bought immediately upon paying for it. That, as a matter of fairness, as well as prudence, one should not pay for a thing until he gets it.

With the aid of the rules of construction mentioned—usage and natural expectation implied, an interpretation which will make the doubtful or disputed provisions operate reasonably and with fairness, and any still lingering doubt resolved against the maker of the instrument—let us read the contracts.

Upon the point of amount and time of payment, the contracts are clear and specific. The vendee agrees to buy a tract of land at the price of

\$25,852.50. He paid down one-fifth of that price, and agreed to pay the remainder within five years, and annual interest in advance on that remainder at the usual rate for loans of money. The transaction is, therefore, on the buyer's part, the equivalent of a present cash payment of entire purchase price. What, then, was the purpose of deferring payment of so large a portion of the price? A further reading of the contracts affords an explanation. *The vendor has no title to the lands, and cannot, therefore, convey.* If the vendee paid in full, he could not get his purchase. He could not even get possession *ad interim*, for the lands were then part of the public domain, open to settlement by, and sale to the public. The *permission* to take possession given him by vendor was of no efficacy whatever, and the vendor is prudent enough to expressly repudiate any obligation on its part to give or retain him in possession, or to "be responsible to him for damages, or costs, in case of his failure to obtain and keep such possession." In fact the vendee did not get possession. Indeed, as a prudent man, he would not dare to take possession if he could; for possession, to be of use, would necessitate improvement, and in case of final refusal of patents he would not only lose his improvements, but be responsible for the value of the use of the lands. For the contracts further declare that while the vendor claims that the lands

are part of a grant to it by the United States, patents for them have not yet been issued; that "it will use ordinary diligence to procure patents for them;" but that as it sometimes happens that the Government will not acknowledge its claims for, and in consequence it fails to get patents, "nothing in this instrument shall be considered a guarantee or assurance that *patent or title* will be procured." And it will be noticed that the "ordinary diligence" is not to be exercised in getting patents or title in *any* mode, or from *any* source, but only in acknowledgment of its claim of gratuitous grant from the United States.

With these facts before us, and before the parties to the contracts, little doubt remains of the purpose of the enforced deferred payment. The seller contemplated that it would be expected of, and incumbent upon it to convey when the price was paid. It could not then convey, but hoped, and, perhaps, expected to be able to convey within a few months, or a year at the farthest. It was as desirous of obtaining the price as the buyer was of obtaining the land. In the ordinary course of business a patent would issue within a year after application for it. It surely, and beyond any possible doubt, would issue within five years, if ever. It would be safe, therefore, to *require* the buyer to close the transaction on his part at the termina-

tion of that period, since the seller would then, if ever, be able to comply with its concurrent duty to convey. It was desirable to close the transaction on both sides as early as possible, but as the seller did not, for the reasons stated, dare to *force* the buyer to an earlier performance, the contracts provided that he *might* close the transaction *as much earlier* "after a receipt of a patent," as he might choose.

Thus far we have considered the matter of the purpose of the enforced deferred payment (and consequent meaning of the five years clause) from the seller's standpoint only.

What were the buyer's purposes in deferring the payment of eighty per cent of the purchase price, and what his understanding of the five years clause?

He knew (1) that he might not get possession of the lands; (2) that the seller and, therefore, he, might never get the title to them; (3) that the time when it *could* be finally determined whether the seller would or would not get patent was necessarily uncertain; (4) that in the meantime he must actually part with one-fifth of the large price and pay interest on the remainder; (5) that, since he might never be able to acquire title, he could not, prudently improve so as to profitably use them, nor barter, nor sell, nor otherwise gain profit from them until patent had actually issued; (6) that he

could receive no compensation by way of damage if the seller finally became unable to convey or, in the *interim*, to give possession, or for loss of improvements if in possession, since he had not agreed absolutely to give either title or possession; (7) that no compensation for the seller's use of the buyer's money actually advanced was to be given him; and (8), that for the return of such moneys as might have been advanced to the seller he had no security. The ordinary security for the return of moneys paid on account of the purchase by a buyer in possession—a lien upon the lands (or equity in them, as respondent calls it)—was entirely absent in this case, since a lien for performance of the seller's obligation would not attach to lands belonging to a stranger to the contract. It does not appear that the buyer supposed, or had any reason to suppose, that the seller was a wealthy and responsible corporation on whom he might safely rely to return any large sum of money. If its solvency was then beyond question, would that condition remain during the long period during which it was entitled to retain the money? And even if its then, and continuing, solvency were established, would it not have been an unusual and extraordinary thing to advance it \$34,940.36 (the price, with five years' stipulated interest), without any security for its return, save the seller's supposed solvency?

Under those circumstances—considering that the buyer had, in expectation of getting the lands within that time, advanced, without interest in case of return, one-fifth of the purchase price of the land for a period not exceeding five years, is it credible that, with such expectation of getting the lands diminished by five years' failure, he agreed to advance the other four-fifths—a sum exceeding \$20,000—for a further and absolutely indeterminate period, without interest for its use, or security for its return? Had such an alleged contract been oral, how much direct and specific testimony would a jury require to establish it? And yet defendant in error claims that the contracts so read by implication! If the contracts clearly expressed such an agreement, they should be declared void for want of mental capacity in the buyer.

Just think of it! The buyer must (says the seller) pay his money—the entire purchase price—and wait for possession and title, until it be “finally determined” whether the seller shall get patents. How determined? First, by the local Land Office; then on appeal to the Commissioner; from him to the Secretary of the Interior. Will the decision of the Secretary be a “final determination?” Not at all. When the applicant became tired or discouraged there, it still had (says respondent) a resort to the courts. The Circuit Court might entertain its bill, it says, or dismiss it.

Then an appeal or writ to this Court, and in course of time a decision which, respondent admits, would be a "final determination" of its right to patents. Provided, of course, that the bill had not been dismissed for want of jurisdiction to dictate to the Department of the Interior. In the latter case the seller might, after its defeat in Court, wait until patents for the lands had been issued to actual settlers, and then bring suit to have it declared that such settlers held their patents in trust for complainant. When, then, would a "final determination" of the matter probably be had? Would the buyer, or even the seller, be then in existence, and who would then enjoy the land, or, if patents refused, the fun of getting back the buyer's little fortune from the Southern Pacific Railroad Company—assuming its fifty year corporate life to have been renewed?

It is, we repeat, incredible that a buyer would make an agreement which could operate in such an utterly unreasonable, unfair, and to him disastrous manner; and no instrument should be construed as containing such an agreement where not expressed in the most clear and incontrovertible language. Of course these contracts contain no such language.

A conviction of the correctness of the construction given that provision of the contracts by the California Supreme Court in department is abso-

lutely unescapable: I will give you \$25,852.50 for the lands you claim, provided you get patents for them in five years. In consideration of your tying up the sale of them to me, I will give you the use of one-fifth of the purchase money and the use of all of the annual interest at seven per cent on the remaining four-fifths while unpaid. That remainder shall be paid in five years, and I am at liberty to pay it sooner if you have the patents. If you don't get the patents, then at the termination of five years you shall return me all the money which I paid you, but without any interest for its use—was the offer made and accepted. And a very safe and profitable contract it was for the seller. Under it the Railroad Company had the free use of part of principal, and interest on balance, for a period of five years—the practical equivalent of \$3,981.06—and didn't have to do a thing in return. A contract to sell what the seller has not, may never have, and is under no liability for failure to acquire, is very safe and profitable, indeed.

4. Under the provisions of the California Civil Code an independent covenant to pay, regardless of ability to convey in return, is made non-enforceable, and is therefore impliedly prohibited.

* An agreement for the sale of property cannot be specifically enforced in favor of a seller who

cannot give the buyer a title free from reasonable doubt."

Sec. 3394 Civil Code of California.

Defendant in error says that the buyer must pay, although the seller has then no title at all. The Civil Code says that the buyer need not pay if the seller cannot give a title free from reasonable doubt.

5. If there is no time for performance specified in the contract, or if the time specified be uncertain, or of uncertain period, as where fixed at the occurrence of an event, the time of which occurrence is incapable of measurement, or maximum or minimum limitation, the law will require performance in a reasonable time.

Williston v. Perkins, 51 Cal., 554;

Vance v. Pena, 41 Cal., 686;

Nunez v. Dautel, 19 Wall., 560.

The events, upon the occurrence of which performance become due under the specifications of the contracts in the above cases, were (1) "when the schooner is sold," (2) "in case said Pena shall not be able to procure a conveyance," and (3) "as soon as the crop can be sold, or the money raised from any other source." The events named were disregarded and a "reasonable time" allowed for the performance.

Applying that rule of reasonable time to the transactions in this case, we cannot well escape the conviction that five years was a goodly long, and more than reasonable, time within which to procure the required patents. In the ordinary course of business, as before suggested, a patent will be issued or refused within one year after the application had been made. And considering all the circumstances of this case—that the buyer *might* close the transaction at any time after the contract if the patents had then been procured, and that he *must* close it at the termination of five years, the natural expectation of receiving the land when fully paid for, and that such receipt of the thing bought usually follows as incidental to the payment for it—no error, we submit, can be made in holding the five years, not only as a necessary intendment of the contracts as to the time when the patents must be issued, but also a reasonable time within which the patents must have been procured.

Indeed, it is an extraordinarily liberal time. Reasoning from the natural propriety of the rule as well as on analogy with adjudicated cases it may be said that anything in excess of two years (double the usual time required) within which to procure the patents would be unreasonable; and that had the buyer, at any time after the expiration of two years, tendered the unpaid remainder

of the purchase price and demanded a deed, he would, upon the refusal to convey, be justified in rescinding the contracts. The "reasonable" time is that period which, in the contemplation of the parties, or, in the absence of any circumstance to show such contemplation, in the opinion of the Court or jury would probably be required for the performance of the act. And if such period be uncertain and might be greatly prolonged, then the law will disregard the whole stipulation as to time and hold a present performance necessary.

In a recent Pennsylvania case (*Kearny v. Hogan*, 154 Pa. St., 112-115) the Court approved the finding of the jury that a delay of two months was an unreasonable time within which to remove an easement from the property, and said:

"A purchaser of real estate is not bound to wait an indefinite time, and keep his money unemployed to enable the vendor to clear his property of incumbrances. Where such incumbrance consists of a judgment or mortgage it can be removed at once by an application of a portion of the purchase money to its payment. But an incumbrance of the character of the one in this case cannot be removed in a summary manner. It may require a month, or it may require a year, and it is unreasonable to expect the vendee to hold himself in readiness to meet his contract for an indefinite period."

If in that case the vendee not only kept his money unemployed, but had given its use to the vendor without charge and without security for its

return, would the language of the Court have been less emphatic as to the unreasonableness of the delay?

VI.

It had been "finally determined" that patents would not issue to the Southern Pacific Railroad Company.

a. In March, 1867, by order and proclamation of the Secretary of the Interior, the lands here in question were withdrawn from sale and private entry. The purpose of that withdrawal was to enable the United States to give the Southern Pacific Railroad Company indemnity for losses in the grant, and the very act of withdrawal was a voluntary dedication or reservation of the lands to that purpose. It had no other legal effect. It gave neither title nor lien to the Railroad Company. It in no way enlarged the terms of the Act of Congress which, as this Court has said, "passed no title, and until executed created no legal interest"—in the Railroad Company.

Such formal withdrawal was essential to release the land from the right of private entry.

Revised Statutes (Sec. 2281) provides that the land shall be subject to private entry until actual withdrawal.

Act of April 21, 1876 (19 Stat., 35), permits right of private entry until publication of notice of withdrawal.

Act of January 13, 1881 (21 Stat., 315), and Sec. 3 of Act of March 3, 1887 (24 Stat., 556), recognize the practice and propriety of such withdrawals.

It has been contended that the Act of July 27, 1866, of itself withdrew the lands by its declaration that "the sections hereby granted" should not be subject to sale or private entry, but a perusal of the Act will bring ready conviction that the "sections hereby granted" in Sec. 6 mentioned are, as there stated, the odd-numbered sections within twenty miles on each side of the railroad by the Act expressly granted.³⁵

Indeed the matter has been removed from the domain of discussion:

"The withdrawal by the Secretary in aid of the grant to the State of Wisconsin was valid, and operated to withdraw the odd-numbered sections within its limits from disposal by the land officers of the government under the general land laws. The act of the Secretary was in effect a reservation."

N. P. R. Co. v. Musser Co., 168 U. S., 604,
607.

In August, 1887, the Secretary of the Interior, by order and proclamation, revoked the order of

³⁵See our point "II c."

withdrawal of March, 1867, and restored the land to the public domain for private entry.

Trans., folio 40, p. 12;

Letter of Secretary Lamar,

6 Dec., Dept. of Int., pp. 84-92.

That order was within the power of the Secretary of the Interior.

Act of April 21, 1876 (19 Stat., 35), impliedly grants such power.

Act of January 13, 1881 (21 Stat., 315), contemplates such a restoration.

Act of March 31, 1887 (24 Stat., 556), gives the Secretary of the Interior general power in the adjustment of railroad land grants.

In August, 1887, the grant to the Southern Pacific Railroad Company was subject to forfeiture for breach of condition subsequent.

The Act of July 27, 1866 (Sec. 8), required the railroad to be completed by July 4, 1876. It was not in August, 1887, nor is it yet completed.

See letter of Secretary Lamar, ante.

The revocation of the order of withdrawal of the lands and their restoration to the public domain for private entry was in effect a denial of the right of the Railroad Company to resort to or select them for indemnity purposes.

The revocation of that order revoked also the dedication or reservation of the lands for railroad

indemnity by that order implied, and was a plain refusal to longer subject the lands to a right of resort thereto by the Railroad Company for indemnity or other purpose.

The act of the Secretary was the act of the United States, and it was not a violent exercise of sovereignty to determine that the Railroad Company had forfeited any claim or expectation it might have had to resort for indemnity to the land so restored to the public domain. Under such circumstances the intention of the United States to deny the railroad claim may be expressed in any informal way—"such as an act resuming control of them and appropriating them to particular uses, or granting them to others to carry out the original object."

A. & P. R. R. v. Mingus, 165 U. S., 433.

That refusal of the Secretary of the Interior to recognize any claim of the Railroad Company to the lands restored to the public domain was in its nature a final determination that patents for those lands would not issue to the Company. Like any other judgment it was final until reversed or overthrown.

- b. A final determination that the patents could not be obtained was made by the lapse of the time within which the patents must, under the intendments of the contracts, be procured.**

This point depends upon the correctness of our contention in point V a herein, that performance—payment and delivery—were concurrent acts, and that as the buyer must pay at the termination of five years, the seller must be prepared to convey at that time.

We trust that the Court has already perceived that is not a mere case of attempted escape from a bad bargain. Ordinarily the buyer gets what he sought and paid for. Here the buyer got nothing, neither title nor possession. And we submit that a seller's attempt to exact the price of a thing which he has neither sold nor delivered is not entitled to any unusual aid from a court of equity.

The judgment in this case imposes a forfeiture—a forfeiture not alone of the buyer's right of purchase, but also of all his moneys advanced on account of that purchase. And that forfeiture is based upon an implied condition—a condition not found in the contracts, but supplied by the Court. Yet the statutory law of California, which should

control the action of the Court, is that

“ A condition involving a forfeiture must be strictly construed against a party for whose benefit it is created.”

Sec. 1442 of Civil Code of California.

In contemplation of the provisions of that section, and of the unvarying rule that equity will never aid a forfeiture, should a court of equity, in a suit in equity, not only aid a forfeiture but imply (create?) the condition upon which that forfeiture is based?

EDWARD R. TAYLOR,
Counsel for Plaintiff in Error.

Reply

SUPREME COURT OF THE UNITED STATES

Filed Feb. 17, 1899

DARWIN C. ALLEN

Plaintiff in Error

vs.

SOUTHERN PACIFIC RAILROAD COMPANY

Defendant in Error

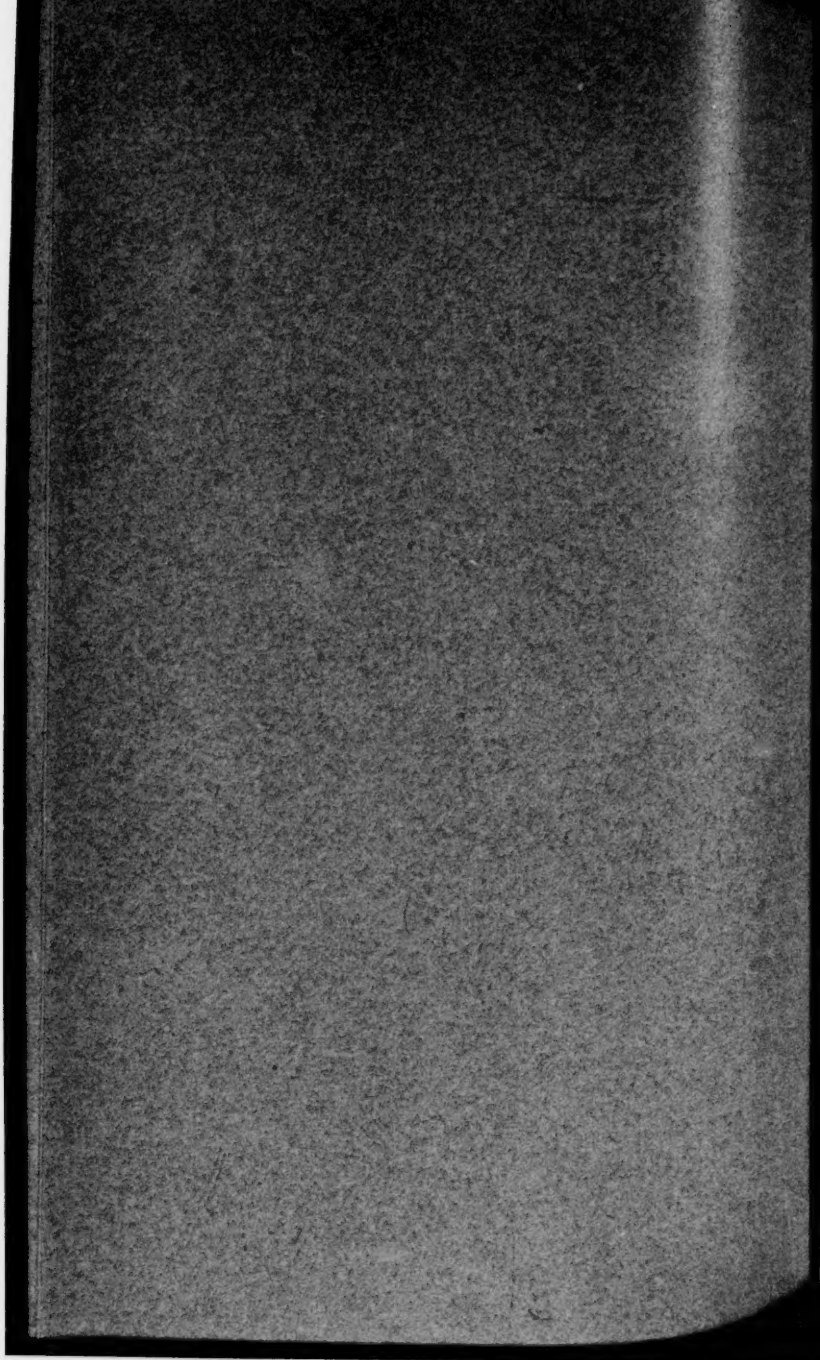
Reply to Motion to Dismiss

EDWARD K. TAYLOR

Attorney for Plaintiff in Error

Filed February....., 1899.

Clerk



Supreme Court of the United States.

OCTOBER TERM, 1898.

DARWIN C. ALLEN,
Plaintiff in Error,

VS.

SOUTHERN PACIFIC RAILROAD
COMPANY,
Defendant in Error.

Reply to Motion to Dismiss.

In its brief herein the defendant in error asks that the writ of error be dismissed on the grounds (1) that the writ was sued out too late—more than one year after the entry of the judgment, and (2) that the case under it presented no Federal question.

The first ground, having been unanticipated, was not referred to in the brief of plaintiff in error, and, by permission of the court, these pages are written in response, chiefly, to that first point of the brief of the defendant in error.

I.

The provisions of law regulating the time of taking out writs of error from this Court to State or United States courts existing at time of passage of Act of March 3, 1891, creating the Circuit Court of Appeals, were not repealed nor disturbed by that Act.

1. Writs of error from United States Supreme Court to State courts must be issued within same limitation of time as if directed to "a court of the United States."

Rev. Stat., Sec. 1003;

Cummings v. Jones, 104 U. S., 419.

2. At the time of the enactment of that statute "courts of the United States" subject to writs of error from this court were not numerous,¹—the only courts of original general jurisdiction so subject being the District and Circuit courts. Hence, this court held the period of limitation for writs of error to State courts to be same as by Sec. 1008 of the Revised Statutes provided for such writs to District and Circuit courts.

Cummings v. Jones, 104 U. S., 419.

3. The limitation of time for issuance of writs of error from this court to a District or Circuit court is two years after entry of judgment.

Rev. Stat., Sec. 1008.

¹Now there are District and Circuit courts, with limitation for writ of error of two years (Rev. Stat. 1008); Circuit Court of Appeals, one year (Sec. 6, Act of March 3, 1891); Court of Claims, ninety days (Rev. Stat. 708); and "the United States courts in the Indian Territory," same as in District and Circuit courts (Sec. 13 Act of March 3, 1891.)

That section has not, nor has any of its provisions been repealed or qualified by the Act of March 3, 1891.

a. Writs of error from this court direct to District and Circuit courts are preserved or newly provided for in Sec. 5 of the Act of March 3, 1891.

b. There is no provision, expressed or to be implied, in the last mentioned Act touching the *time* within which a writ of error from this court to a District or Circuit court may issue.

Sec. 5 of that Act deals exclusively with the revisory jurisdiction of this court over District and Circuit courts, retaining the theretofore existing direct relation between these courts in certain designated classes of cases. It is silent as to *time* within which the writ of error may issue.

Sec. 6 of the Act deals exclusively with the revisory jurisdiction of the then newly created Circuit Court of Appeals—an appellate tribunal exclusively—and enumerates classes of cases in which the judgment of that court shall be “final.” Then follows:

“In all cases not hereinbefore, *in this section*, made final there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed One thousand dollars besides costs.

“But no such appeal shall be taken or writ of error sued out unless within one year after the entry of the order, judgment or decree sought to be reviewed.”

Surely, there is no uncertainty in those paragraphs? Nothing upon which to base a doubt that the “such” appeals and writs of error regulated by the last sentence

are the appeals and writs of error created in the immediately preceding sentence?

Of course, if the words, "But no such appeal," etc., of that last sentence of Sec. 6 of the Act of 1891, could be made to immediately follow Sec. 1003 of the Revised Statutes (as they are made to do in the defendant's brief), they might bear the meaning that brief urges be given them.

Cases originating in District and Circuit courts appear to be, by the Act of 1891, divided into three classes: first, those which may be disposed of finally in the Circuit Court of Appeals; second, those which the latter named court may entertain on their way to final review by this court; and third, those which pass by the Circuit Court of Appeals and submit themselves direct to this court. An examination of those cases show that they are so classified by the Act in the order of their importance. Of the two classes reaching this court the one involves but ordinary property rights, and the other capital crimes, construction of treaties and of constitutions, State and Federal. The first, coming here with the retouch of the Circuit Court of Appeals upon it, must start within the year; the second, coming here from the original mold, may begin its more dignified march in two years.

But, seriously, whether or not Congress purposely left Sec. 1008 untouched, untouched it surely is, and the limitation for issuance of writs of error to District and Circuit Courts is now, as heretofore, two years.

And without Sec. 1008 there would be no limitation to

issuance of writs of error from this court to the District or Circuit court.

THE FEDERAL QUESTIONS.

a. How presented and passed upon.

To support the judgment of the California courts here in review, it is absolutely essential that the plaintiff below owned, or had such vested interest in the lands which it purported to sell as legally enabled it to make the contracts of such sale in this action sought to be enforced. That was always conceded in the courts below, and in this argument we will assume it to be conceded here. The trial court declared that the lands "were part of the public domain of the United States and were granted to plaintiff" by the Act of July 27, 1866. That declaration of grant was, of course, but a conclusion of law based upon the "finding" of the court that the lands were odd numbered sections situated within thirty miles of plaintiff's railroad, were once withdrawn from, but afterwards restored to the public domain, that patents to them had not issued to plaintiff,¹ although it had applied for them, the applications being yet pending and not finally rejected. These facts fairly presented the question whether the railroad company had such vested interest in the lands as to authorize contracts for their conveyance, and this suit to enforce the performance of such contracts.

¹In several pages of the brief of defendant in error appears an assertion that since the trial of this case patents had issued to the Railroad Company. We can no more concede the truth than we can the propriety of those assertions. Even if true they are impertinent to the case before this court; and if pertinent they are unwarrantably made, being *dehors* the record.

In its first decision (in favor of the defendant below) the California Supreme Court expressly declined to pass upon that question, the court saying: "The court found the plaintiff to be the owner in fee, and much nice reasoning is advanced for and against the finding. But under our interpretation of the contracts it is a matter irrelevant."

Record, p. . . ., 40 Pac. Rep., 752-3.

In the final judgment the opinion of the court ignored all the Federal questions argued, but that judgment necessarily assumed, indeed, by the affirmance of the judgment of the trial court, impliedly declared that the plaintiff below was the owner in fee of the land.

b. The questions and their bases.

Upon the facts of the record that at the time of the execution of the contracts, and up to and including the rendition of judgment the title to the lands was in the United States, and that although within the railroad indemnity belt and once withdrawn from, they had thereafter been restored to, the public domain, and upon the legal implications from those facts arising we base our contention that

1. "There was drawn in question the validity of an authority exercised under the United States."

2. "A privilege or immunity claimed under . . . a statute . . . or authority exercised under the United States"; the decision being against the validity of the exercise of the authority in the first case, and against the

validity of the claim of privilege or immunity in the second.

The authority exercised under the United States is that of the Secretary of the Interior in restoring the lands to the public domain for private entry, and which restoration, we contend, had the effect (1) of freeing the lands from any right of resort thereto by the railroad company for indemnity, and (2) a final determination, within the terms and intendments of the contracts, that patents for those lands would not issue to that company.

The statute under which we claim immunity from the demands of the railroad company is the Act of Congress of July 27, 1866, which, we contend, gave the railroad company no right to, or at least no vested interest in, any lands of the indemnity belt until their selection under the direction of the Secretary of the Interior.

As to the requirement of Sec. 709 of the Revised Statutes that the privilege or immunity of the second class mentioned must be specially set up or claimed, we beg to suggest that the requirement was no more than the recital of a rule of pleading universally prevailing in the United States at the time of the passage of the Act, — A. D. 1789. Where, under the reformed procedure prevailing in so-called Code States (of which California is one), such special pleas are not permitted, the law itself making the plea whenever the facts upon which it is based appeared in the case, the special plea requirement of the Federal statute is not applicable nor operative.

The judgment roll in this case contains a recital of the facts upon which the special pleas of privilege and im-

munity are based. Under the California procedure the California Supreme Court was bound by that recital as much as if specially set up in the pleadings; and this Court, taking the record and case from the California court, is bound by the same rule of pleading and procedure as was that court.

The word "immunity" in Sec. 709 of the Revised Statutes, bears, in popular understanding at least, a meaning as well negative as affirmative in freeing or protecting. And one resisting the demands of another purporting to be based on, say, a Federal statute, would, in that sense, be claiming immunity under that statute when seeking its judicial construction, antagonistic to that sought to be placed upon it by the demandant.

At any rate this court has held that a judgment of a State court sustaining the exercise of an authority by the Secretary of the Treasury (such as here shown by the Secretary of the Interior) was subject to review by this court, as involving a Federal question. The court said:

"The construction of the Acts of Congress, conferring power on the Secretary to do the acts complained of, were prominently drawn in question, and the decision below rejected the title set up *by maintaining the validity* of the Secretary's decision.

Maguire v. Tyler, 1 Black, 195, 203.

Respectfully submitted,

EDWARD R. TAYLOR,

Attorney for Plaintiff in Error.

No. 144.

Ex. of Herrin v. Evans for

U.S. SUPREME COURT D. C.
FILED

JAN 16 1899

JAMES H. MCKENNEY,

Supreme Court of the United States.

OCTOBER TERM, 1898.

Filed Jan. 16, 1899.
No. 144.

DARWIN C. ALLEN,

Plaintiff in Error,

against

THE SOUTHERN PACIFIC RAILROAD
COMPANY,

Defendant in Error.

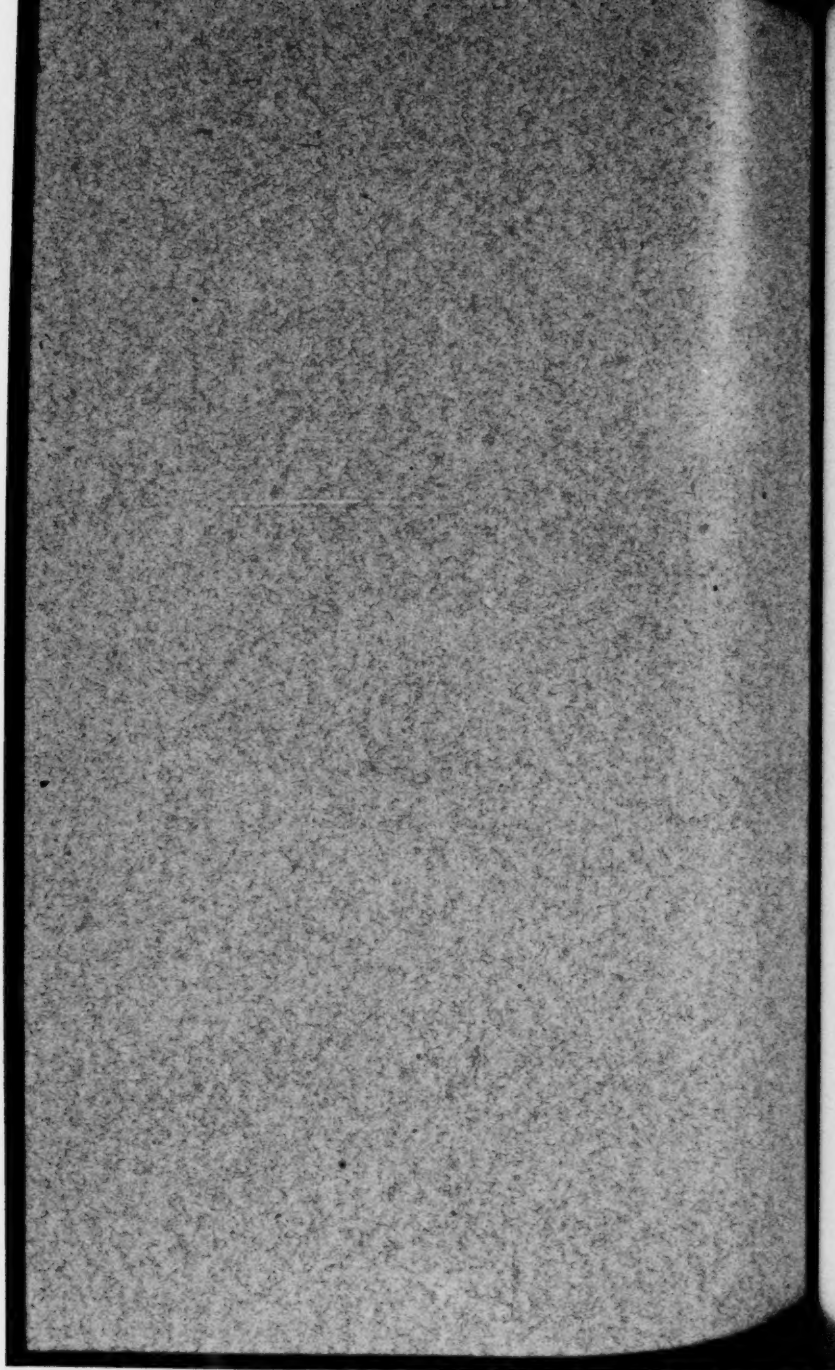
IN ERROR TO THE SUPREME COURT OF CALIFORNIA.

Brief of Defendant in Error.

WM. F. HERRIN,

MAXWELL EVARTS,

Of Counsel for Defendant in Error.



Supreme Court of the United States.

OCTOBER TERM, 1898.

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DARWIN C. ALLEN,
Plaintiff in Error,

AGAINST

THE SOUTHERN PACIFIC RAILROAD
COMPANY,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF CALIFORNIA.

BRIEF OF DEFENDANT IN ERROR.

Statement.

On the 1st day of February, 1888, the Southern Pacific Railroad Company, the defendant in error and the plaintiff below, agreed to sell to Darwin C. Allen, the plaintiff in error, and the latter agreed to buy, certain land situated in the County of Tulare, California. Eighty-four contracts were executed, but they were all precisely alike, except as to the description of the land and the price thereof, and only one has been printed in the record (Rec., p. 4).

Under the terms of these agreements Allen was to pay one-fifth of the purchase money and a year's interest upon the balance at the time of the execution of

the contracts. The interest on the remainder of the purchase price was to be paid annually in advance at the rate of seven per cent. together with the taxes and assessments that might be levied upon the property, and the balance of the purchase money was due on the 1st day of February, 1893.

The railroad company claimed the tracts of land covered by these contracts as part of a grant of lands to it by Congress, but at the time the agreements were executed no patent had been issued by the Government therefor. It was expressly provided in the contracts that, upon the punctual performance by Allen of the conditions contained therein, the railroad company would "*after the receipt of a patent therefor from the United States*" execute and deliver to Allen "a grant, bargain and sale deed of said premises."

It was also particularly stated in the contract that the railroad company would "*use ordinary diligence to procure patents*" for the land, and "*that, as in consequence of circumstances beyond its control, it sometimes fails to obtain patent for lands that seem to be legally a portion of its said grant, therefore, nothing in this instrument shall be considered a guarantee, or assurance that that patent or title will be procured; that, in case it be finally determined that patent shall not issue*" (Rec., p. 5) to it, that then the railroad company should repay (without interest) to Allen all moneys that may have been paid by him on account of land which it fails to procure a patent for.

Allen did not pay in accordance with his contract the interest upon the balance of the purchase money which was due on the 1st of February, 1889, and he also failed to make the payments falling due upon the 1st of February, 1890, and the 1st of February, 1891 (Rec., p. 2).

This interest amounted in the aggregate under all the contracts to the sum of \$4,343.19, to recover which sum the railroad company brought suit in the Superior Court of the County of Tulare, California, on the 6th day of August, 1892 (Rec., p. 3).

The complaint simply sets forth the facts in the case and is the ordinary pleading in an action for the breach of a contract, except that it asks for the equitable relief of foreclosure of defendant's interest in the lands in case he fails to pay the sums found to be due within 30 days from the entry of a final decree (Rec., p. 1). The answer consists entirely of a denial of certain allegations contained in the complaint. With his answer the defendant below filed a cross-complaint in which he sought to recover the money he had paid the railroad company on account of this land and also heavy damages by reason of a third party to whom he had undertaken to sell the land, having refused to complete the purchase (Rec., pp. 6-8). The ground for the recovery claimed in the cross-complaint was the alleged false representations made by the railroad company that it was the owner of the land under a grant from Congress. In its answer to the cross-complaint the railroad company denied the allegation of Allen that it was not the owner of said land and averred that it was the owner thereof under the Act of Congress of July 27th, 1866 (14 Stat. at Large, 292, 299) (Rec., p. 8).

The case was subsequently removed to the Superior Court of the County of San Francisco (Rec., p. 9) and was tried in April, 1893 (Rec., p. 10), after the final payment of the purchase money had become due on the 1st of February, 1893. None of the evidence offered by either party has been printed in the record, but the trial Judge found as facts all the material allegations contained in the complaint. He also found against the defendant upon all the material allegations in his cross-complaint, and as a conclusion of law from the facts as found by him the trial Judge held that the railroad company was entitled to a decree that defendant should pay the sum sued for within six months from the entry of the decree, and in case of his failure to do so that he should be foreclosed of all his right, title and interest in the premises, and that the plaintiff should be let into possession thereof.

The final decree was entered in accordance with the conclusions of the trial Judge upon the 9th day of November, 1893 (Rec., p. 13), and the defendant below immediately took an appeal to the Supreme Court of California (Rec., p. 14).

The appeal was first heard by the Court sitting in department (a division of the Court consisting of three Judges), which modified the final decree in certain respects (Rec., pp. 21-24). Afterwards the cause was argued before the Court in bank (seven Judges), which affirmed the final decree as entered in the trial Court (Rec., pp. 15-18).

The judgment of the Supreme Court of the State of California affirming the decree below was entered upon the 17th day of April, 1896 (Rec., p. 28), and on the 7th day of June, 1897, the plaintiff in error without filing any petition therefor applied to the Chief Justice of the Supreme Court of California for a writ of error bringing said case to this Court, and the writ of error was allowed (Rec., p. 27).

Since the trial of this case in the Superior Court of the County of San Francisco and on the 1st day of December, 1894, a patent for all of the land involved in this case except one section was issued to the defendant in error by the United States. The one section excepted from this patent was theretofore conveyed to the railroad company by the United States by a patent dated December 1st, 1891.

POINT I.

The writ of error was sued out after the expiration of one year from the date of the judgment sought to be reviewed and should therefore be dismissed.

An examination of the record shows that the judgment of the Supreme Court of California was entered upon the 17th day of April, 1896 (Rec., p. 28), and that the writ of error was not obtained until the 7th day of June, 1897 (Rec., p. 27). As we understand the provision of the statutes in this regard the writ of error was sued out a month and a half after the time allowed for obtaining it had expired.

By Section 1003 of the United States Revised Statutes it is provided that :

“ Writs of error from the Supreme Court to a State Court in cases authorized by law, shall be issued in the same manner, and under the same regulations, and shall have the same effect as if the judgment or decree complained of had been rendered or passed in a Court of the United States.”

The last paragraph of the 6th section of the Judiciary Act of March 3d, 1891, entitled “ An Act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes ” (26 U. S. Stat. at Large, 826) reads as follows :

“ But no such appeal shall be taken or writ of error sued out unless within one year after the entry of the order, judgment or decree sought to be reviewed.”

The foregoing regulation of the Act of March 3d,

1891, is and has been, since such act was passed, the only regulation in force relative to the time in which a writ of error from this Court to a judgment in the United States Circuit or District Court must be brought. The old rule was two years, but Section 1008 of the United States Revised Statutes, which so provided, was repealed by Section 14 of the Judiciary Act of March 3d, 1891, and the limit of one year in which to bring a writ of error to a judgment of a United States Court was substituted for the old period of two years.

As the regulations governing writs of error from this Court to a State Court are the same as the regulations in cases of writs of error from this Court to a United States Court (U. S. Rev. Stat., § 1003), we understand that the limit of one year in which to sue out a writ of error applies to writs of error from this Court to a State Court.

The old limit for bringing writs of error from this Court to review judgments of the United States Courts was five years (§ 22 of the Judiciary Act of 1789; 1 U. S. Stat. at Large, p. 85), and it was also provided by said act that a writ of error from this Court to review a judgment of a State Court should be issued "in the same manner and under the same regulations, and the writ shall have the same effect, as if the judgment or decree complained of had been rendered or passed in a circuit court" (§ 25 of the Judiciary Act of 1789; 1 Stat. at Large, p. 86).

The change from the limit of five (5) years in which to review by writ of error a judgment of a United States Court under the Judiciary Act of 1789 to a period of two years in pursuance of the provisions of Sect. 1008 of the United States Revised Statutes was substantially and in every material respect so far as this question is concerned the same as the reduction of the limit of two years (§ 1008, U. S. Rev. Stat.) to one year under the Judiciary Act of March 3d, 1891.

After the change from five years to two years as the

period within which a writ of error from this Court to a United States Circuit Court or District Court must be obtained, it was contended that such change did not apply to writs of error from this Court to a State Court, inasmuch as no reference was made in § 1008 of the Revised Statutes to the State Courts, and that writs of error to such courts could still be sued out after the expiration of two years and within five years from the date of the entry of the judgment sought to be reviewed.

This question first came before this Court in the case of *Cummings vs. Jones*, 104 U. S., 419, when Mr. Chief-Justice WAITE delivered the opinion of the Court as follows :

“ This is a writ of error to the Supreme Court of Louisiana, brought more than two but less than five years after the judgment to be reviewed was rendered, and one of the questions raised on this motion is whether the limitation of two years prescribed by Sec. 1008 of the Revised Statutes, for bringing writs of error to the Circuit and District Courts, applies to writs of error to State courts. We have no hesitation in saying it does. Sec. 1003 provides that ‘ writs of error from the Supreme Court to a State court, in cases authorized by law, shall be issued in the same manner, and under the same regulations, and shall have the same effect, as if the judgment or decree complained of had been rendered or passed in a court of the United States.’ This is almost the exact language of a similar provision in the twenty-fifth section of the Judiciary Act of 1789, and we are not aware it was ever supposed that writs issued to the State court under that section were not subject to the limitation prescribed for writs to the Circuit Courts by the twenty-second section. In *Brooks vs. Norris* (11 How., 204) this seems to have been assumed, and a writ to a

State court was dismissed 'on the ground that it is barred by the limitation of time prescribed by the act of Congress.' There was at that time no other limitation than the one contained in the twenty-second section."

See, also,

Scarborough vs. Pargoud, 108 U. S., 567.

Polleys vs. Black River Co., 113 U. S., 81.

It is not plain what distinction there can be between the case of the change of the Statute of Limitations from five (5) years to two (2) years, and the subsequent reduction of the period from two (2) years to one (1) year. If, in the former case, it was held that such change applied to writs of error from this Court to State Courts, it would seem to follow that the last change of the Statute of Limitations from two years to one would also regulate the practice in suing out a writ of error from this Court to a State Court in any case which can be reviewed by Sec. 709 of the United States Revised Statutes.

It may be said that the last paragraph of Section 5 of the Judiciary Act of March 3d, 1891 (26 Stat. at Large, p. 828), has some bearing in this matter, but we do not so understand it. This clause of the act is as follows :

"Nothing in this act shall affect the jurisdiction of the Supreme Court in cases appealed from the highest court of a State, nor the construction of the Statute providing for review of such cases."

The question of the jurisdiction of this Court over cases brought here by writ of error from the highest court of a State under Section 709 of the United States Revised Statutes, and the question of the construction of such Section 709, have nothing whatever to do with the question of the time within which the writ of error must be brought. In other words, the clause of the Judiciary Act of March 3d, 1891, just quoted, refers

solely to Section 709 of the Revised Statutes, and has to do entirely with its construction and the jurisdiction of this Court over cases brought here under its provisions from the State courts, and so far as we can see relates in no way to the limitation of time for bringing the writ of error, which is a question of procedure and not of jurisdiction.

In the 25th section of the Judiciary Act of 1789 (1 Stat. at Large, 85) will be found substantially the same provisions in regard to jurisdiction as are contained in Section 709 of the Revised Statutes, and also by reference to the regulations governing writs of error to United States Courts the Statute of Limitations of five years then in force. When the United States Statutes were revised the clear distinction between the two parts of this 25th section of the Act of 1789 was recognized by the revisers, and the clauses of the section relating to jurisdiction were incorporated in Section 709 of the Revised Statutes in Chapter Eleven, which is entitled, "Supreme Court-Jurisdiction," while the clauses relating to the Statute of Limitations—to the time within which appeals must be taken and writs of error must be brought—will be found in Sections 1003 and 1008 of the Revised Statutes under Chapter Eighteen, entitled "Procedure."

This is what we desire to point out here. The last paragraph of Section 5 of the Judiciary Act of March 3d, 1891 (26 Stat. at Large, 828), relates entirely to the jurisdiction of this Court, and has nothing to do with the question under consideration, which is merely one of procedure. The clause of the sixth section of the same act limiting the time within which to sue out a writ of error from this Court to a United States Circuit or District Court to one year after the entry of the judgment sought to be reviewed relates solely to a question of procedure, which is the only question now being discussed and must necessarily fix the limit within which to sue out a writ of error from this Court to a State court because of Section 1003 of the United States Revised Statutes, which so enacts.

POINT II.

This Court cannot take jurisdiction of this case, and the writ of error should be dismissed.

The only power of this Court to re-examine the judgments of the highest court of a State is conferred upon it by Section 709 of the United States Revised Statutes, which enacts that :

“A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity ; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity ; or where any title, right, privilege or immunity is claimed under the Constitution, or any treaty or statute of, or commission held, or authority exercised under the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed by either party under such Constitution, treaty, statute, commission or authority, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error.”

There are three distinct clauses of this section which give jurisdiction to this Court over judgments entered in the highest court in a State, but if this Court can take jurisdiction of the present case thereunder it must be under either the first or third clause, as there is no

suggestion in the writ of error or elsewhere in the record that the second is in any way applicable to it.

1. The first is : " Where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity."

2. The third is " where any title, right, privilege or immunity is claimed under the Constitution, or any treaty or statute of or commission held or authority exercised under the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed by either party under such constitution, treaty, statute, commission or authority."

There are many questions which have so often arisen in cases of this character and have been so many times decided that they may be regarded as definitely settled by this Court, and among others are the following :

(1) The title, right, privilege or immunity must be specially set up or claimed at the proper time and in the proper way.

(2) The petition for the writ of error forms no part of the record upon which action is taken here.

(3) The right on which the party relies must have been called to the attention of the Court in some proper way, and the decision of the Court must have been against the right claimed.

(4) At all events, it must appear from the record by clear and necessary intendment that the Federal question was directly involved so that the State Court could not have given judgment without deciding it ; that is, a definite issue as to the possession of the right must be distinctly deducible from the record before the State Court can be held to have disposed of such Federal question by its decision.

These four propositions are referred to with others and stated to be settled law in the case of *Sayward vs.*

Denny, 158 U. S., 180, and it will be well to see how far the record in the present case conforms therewith.

In the first place, it is noticeable that there was no petition for the writ of error; at least, there is none printed in the record. The writ of error simply follows in a perfunctory and somewhat inaccurate manner the wording of Section 709 of the Revised Statutes. It, however, fails to say what statute of, or authority exercised under, the United States was drawn in question and their validity denied, and also what the title, right, privilege and immunity was which was especially claimed by Allen under such statute.

We, therefore, find nothing to assist us in the writ of error, but we do not know that this is a matter of any importance, for, if "the petition for the writ of error forms no part of the record upon which action is taken here," certainly the writ of error itself cannot do so.

We are left, therefore, to the record proper to ascertain what the title, right, privilege and immunity is which was specially set up and claimed by Allen, and under what statute of or authority exercised under the United States it arose.

The record in this case is very short. It consists of the pleadings, findings of fact, conclusions of law, final decree, and the opinions of the Court below. No evidence is printed. We have searched the pleadings in vain for any indication that the validity of an Act of Congress or an authority exercised under the United States was drawn in question in this case. It is true that in the cross-complaint of Allen, the defendant below, it is alleged that the railroad company was not the owner of the lands in question under a grant from Congress (Rec., p. 7), and in the answer to the cross-complaint the railroad company avers that it was the grantee of said lands under the Act of Congress of July 27th, 1866 (14 Stat. at Large, 292, 299).

It is not clear whether this Act of Congress is the statute of the United States which is referred to in

the writ of error, but as it is the only one referred to in the record it is safe to assume that it is.

It, however, does not appear that the validity of this statute was in any way doubted or questioned. There might be a question as to whether certain lands did or did not fall within the limit of a certain grant of Congress. This would be simply a question of fact, and would not in any way affect the general validity of the act in question. So in this case the claim by the defendant Allen that the lands referred to in the contract were not owned by the railroad company, and the denial of such claim by the railroad company merely amounted to a dispute as to whether the lands were within the provisions of the Act of 1866, and did not in any way draw in question the validity of such Act.

If, however, it were possible to say that such a contention did in fact draw in question the validity of the Act of 1866, yet the decision of the Court sustained its validity, and so furnished no grounds for a review of the judgment by this Court, for in order to give this Court jurisdiction under the first clause of section 709 U. S. Revised Statutes, it is necessary to find two facts present at the same time : (1) that the validity of the Statute was drawn in question, and (2) that the decision was against its validity. In the present case we find neither of these facts, but on the contrary the statute was never questioned ; and, if it was, the decision of the Court below was in favor, and not " against its validity," for the finding of the Court was that the railroad company was the owner of the land under the Act of 1866.

No federal question being raised in the pleadings and there being no evidence printed in the record, it is necessary to look at the findings of fact to discover whether the validity of any statute of or authority exercised under the United States was drawn in question in the decision of this case. The findings fail to disclose any questioning of the validity of any Act of Congress, and simply find that the railroad company

" is the owner of said lands in fee under the provisions of said Act of Congress " (Rec., p. 12).

In the four opinions of the Court below which are printed in the record (Rec., pp. 15-24), the validity of no Act of Congress is considered or discussed. In fact, no mention is made of any Act of Congress whatever, and the Act of July, 1866, is not once spoken of in any of the opinions. It is very clear from the opinions that the Court below never, for one moment, supposed that it was considering or disposing of any Federal question, or that any such question had been presented or had been intended to be presented to it, and simply understood what was, in truth, the fact, that the only question before it was the construction and meaning of the contracts entered into between the Southern Pacific Railroad Company and Allen.

It is also to be noticed that there is no assignment of error which, in any way, brings up the question of the validity of any United States statute or of an authority exercised under the United States, which was denied by the Court below. The assignment of errors is perfectly silent upon the matter, and there is no claim in any of the errors assigned that the Court below erred in its consideration of the validity of any Act of Congress, or of any authority exercised under the United States, or that it erred because its decision was against such validity (Rec., pp. 24-26).

What we have said in regard to the failure of the record to show that the validity of any statute of or authority exercised under the United States was drawn in question in the decision of this case and denied applies with still greater force to the second ground claimed for the exercise of the jurisdiction of this Court under the third clause of Section 709 of the Revised Statutes.

It is impossible to find in this record, from one end of it to the other, that Allen, the defendant below, claimed or set up any title, right, privilege or immunity, under any statute of, or authority exercised under, the United States, and that the decision of the Court

was against such "title, right," etc. There is certainly no title, right, privilege or immunity claimed or set up in Allen's answer or cross-complaint and no suggestion that any title, right, privilege or immunity was intended to be claimed or set up. It is not clear that any such privilege or immunity could be asserted except in the pleadings of the party claiming it, but we are unable to find, in any other part of the record, that any title, right, privilege or immunity under any statute of or any authority exercised under the United States is claimed or set up by Allen and that the decision of the Court below was against such title, right, etc. There is not even a suggestion of such a thing, and there is nothing in this record to indicate, in any way, that upon the trial of this case in the Superior Court of San Francisco or upon the argument before the Supreme Court of California, in department or in bank, either party or any of the Courts, ever for a moment, thought that any Federal question was raised in, or in any possible way connected with, the decision of this case.

It would, therefore, seem that this Court should decline to take jurisdiction of this case for the reasons just stated, and we refer hereafter to the authorities in this Court upon these questions.

(a)

THE VALIDITY OF NO STATUTE OF, OR AUTHORITY EXERCISED UNDER, THE UNITED STATES WAS DRAWN IN QUESTION IN THIS CASE, AND, EVEN IF IT WAS, THE DECISION OF THE COURT BELOW WAS IN FAVOR OF AND NOT AGAINST ITS VALIDITY.

It is somewhat difficult to seriously argue this question, for the reason that there is nothing in the record which seems to raise it. If, however, it is claimed by the plaintiff in error that the validity of the Act of July, 1866 (14 Stat. at Large, 292), was drawn in question, the answer is that the only question which arose in this case under that

act was simply whether the lands covered by the contracts referred to in this suit were within the provisions of the said act or not, which in no way concerned the validity of the statute.

In other words, the validity of a statute is not drawn in question every time rights claimed under such statute are controverted. Allen claimed that the land in question did not come within the provisions of the Act of 1866, and the Southern Pacific Railroad claimed that it did, but neither of them doubted that the act was a valid and proper exercise of the power of Congress.

As was said in the opinion in *Cook County vs. Calumet and Chicago Canal Co.*, 138 U. S., 635, 653 :

"The validity of a statute is not drawn in question every time rights claimed under such statute are controverted, nor is the validity of an authority every time an act done by such authority is disputed."

In *Ferry vs. King County*, 141 U. S., 668, 671, Mr. Chief-Justice FULLER, speaking for the Court, said :

"We have carefully examined the record in this case and have failed to find any intimation of the submission of a federal question to the State Court for decision, nor can we perceive that the judgment rendered necessarily involved the disposition of such a question. * * *

"We have repeatedly held that the validity of a statute is not drawn in question every time rights claimed under such statute are controverted, nor is the validity of an authority every time an act done by such authority is disputed."

If, however, it is possible to work out from this record that the validity of the Act of 1866 was drawn in question in this case, then its validity must necessarily have been questioned upon the ground that it did

not include within its provisions the land in controversy. Now, the only decision of the Court upon this is in the findings, where it is found as a fact that the railroad company was the owner of the land under the Act of 1866, so that any decision of the Court (if it can be said that there was one) was in favor of and not against the validity of the act, and this Court is, therefore, without jurisdiction of the case under Section 709, Revised Statutes.

In other words, in order that this Court may re-examine the judgment of the Supreme Court of California under the first clause of Section 709 of the Revised Statutes, it is not only necessary that the validity of the Act of 1866 or of an authority exercised thereunder should have been drawn in question within the proper meaning of these words, but it is also required *that the decision of the Court should have been against such validity*. Both of these conditions are necessary to give jurisdiction to this Court, but neither of them appears in this case.

(b)

THE CLAIM OF ANY TITLE, RIGHT, PRIVILEGE OR IMMUNITY UNDER ANY STATUTE OF OR AUTHORITY EXERCISED UNDER THE UNITED STATES (IF ANY SUCH CLAIM WAS EVER MADE AT ANY TIME OR IN ANY WAY, WHICH WE DENY) WAS NOT SET UP AT THE PROPER TIME AND IN THE PROPER WAY.

As we have before pointed out, it does not appear from the record that Allen, the plaintiff in error, ever claimed or set up any title, right, privilege or immunity under any statute of or authority exercised under the United States, and, as we understand the decisions of this Court, even if the State Court did by its final judgment deny any title, right, privilege or immunity of the plaintiff in error yet this Court has no jurisdiction, if such title, etc., was not set up or claimed in the Court below.

In *Oxley Stave Company vs. Butler County*, 166 U. S., 648, it was held that

“ This court cannot review the final judgment of the highest court of a State *even if it denied some title, right, privilege or immunity of the unsuccessful party*, unless it appear from the record that such title, right, privilege or immunity was ‘ specially set up or claimed ’ in the state court as belonging to such party under the Constitution or some treaty, statute, commission or authority of the United States—Rev. Stat., § 709 ” (syllabus).

If this Court has no power to re-examine a judgment of a State Court in which a title, right, privilege or immunity is denied unless such title, right, privilege or immunity is expressly set up or claimed in the Court below, it would seem to be clearly the rule in a case where there had apparently been no denial of any title, right, privilege or immunity and no such title, right, etc., had been specially set up or claimed.

In *Mutual Life Insurance Co. vs. Kirchoff*, 169 U. S., 103, the *Oxley Stave Company* case just referred to was

“ cited, quoted from and approved to the point that the words ‘ specially set up or claimed ’ in Rev. Stat., § 709, imply that if a party in a suit in a state court intends to invoke for the protection of his rights the Constitution of the United States, or some treaty, statute, commission or authority of the United States, he must so declare; *and unless he does so declare ‘ specially,’ that is, unmistakably, this court is without authority to re-examine the final judgment of the state court* ” (syllabus).

In short, it has been held many times in this Court that, before it can take jurisdiction of a case brought

here from a State Court by writ of error upon the ground that a title, right, privilege and immunity of the plaintiff in error under some statute of or authority exercised under the United States has been denied, it must appear from the record that such title, right, privilege or immunity was specially set up or claimed at the proper time and in the proper way (*California National Bank vs. Thomas*, 171 U. S., 441; *Kipley vs. Illinois*, 170 U. S., 182; *Levy vs. Superior Court of San Francisco*, 167 U. S., 175; *Chicago & Northwestern Railway Co. vs. Chicago*, 164 U. S., 454; *Dibble vs. Bellingham Bay Land Company*, 163 U. S., 63; *Winona & St. Peter Land Co. vs. Minnesota* [No. 2], 159 U. S., 540; *Sayward vs. Denny*, 158 U. S., 180; *Morrison vs. Watson*, 154 U. S., 111; *Miller vs. Texas*, 153 U. S., 535; *Powell vs. Brunswick County*, 150 U. S., 433; *Schuyler National Bank vs. Bollong*, 150 U. S., 85; *McNulty vs. California*, 149 U. S., 645; *Bushnell vs. Crooke Mining Co.*, 148 U. S., 682; *Brown vs. Massachusetts*, 144 U. S., 573; *Leeper vs. Texas*, 139 U. S., 462; *Texas & Pacific Railway Company vs. Southern Pacific Co.*, 137 U. S., 48; *Northern Pacific Railroad Company vs. Austin*, 135 U. S., 315; *Manning vs. French*, 133 U. S., 186; *Baldwin vs. Kansas*, 129 U. S., 52; *Chappell vs. Bradshaw*, 128 U. S., 132; *Clark vs. Pennsylvania*, 128 U. S., 395; *Brooks vs. Missouri*, 124 U. S., 394; *Spies vs. Illinois*, 123 U. S., 131, 181).

There is no indication in the record that the State Court had the slightest idea that by its decision it was denying any title, right, privilege or immunity of the defendant below under a statute of or authority exercised under the United States. There is certainly no statement in any of the opinions from which any such inference can be drawn. There is not a single reference in the opinions to any Act of Congress, nor to any title, right, privilege, etc., claimed by Allen. The question, and the only question, considered and decided by the Court was the meaning and construction of the contracts referred to in the complaint.

In the case of *Brown vs. Colorado*, 106 U. S., 95, which was an action in ejectment brought by the State of Colorado, the plaintiff offered in evidence a deed from the defendant to the Territory of Colorado. Objection was made to its introduction upon the ground that the Territory of Colorado had no right to take a conveyance of real estate at the time of making the deed without the consent of the Government of the United States. This objection was overruled. When the case was appealed one of the assignments of error was to the effect that the Court erred in receiving this deed in evidence. The judgment was affirmed, thereby overruling the assignment, and upon this ground the case was brought by writ of error to this Court, where it was dismissed. Mr. Chief-Justice WAITE, in his opinion, at page 97 said :

“The record furnishes no indication that any statute of the United States was brought to the attention of the Court below, and a ruling asked upon it in connection with the objection which was made to the admissibility of the deed. No Judge, in deciding upon the objection, as it was made and presented, would be likely to suppose that if he admitted the evidence he would deny the defendant any ‘right, title, privilege or immunity’ ‘set up or claimed’ under a statute of the United States. *Certainly, if the judgments of the Courts of the States are to be reviewed here for decisions upon such questions, it should be only when it appears unmistakably that the Court either knew or ought to have known that such a question was involved in the decision to be made.*”

In *Susquehanna Boom Co. vs. West Branch Boom Co.*, 110 U. S., 57, it was said that :

“Where the federal question insisted on in this Court, respecting a contract between a State

and a corporation in the grant of franchises by the former to the latter, was not raised at the trial in the State Court, or where it does not appear unmistakably that the State Court either knew or ought to have known prior to its judgment that the judgment, when rendered, would necessarily involve that question, this Court cannot take jurisdiction of the case for the purpose of reviewing the judgment of the State Court " (syllabus).

(c)

EVEN IF A FEDERAL QUESTION WAS PRESENTED TO THE SUPREME COURT OF CALIFORNIA (WHICH WE DENY), NO SUCH QUESTION WAS DECIDED BY THAT COURT.

It certainly cannot be argued that any Federal question was considered by the California Court. There is not an expression of a single Judge which can be said to in any way indicate that he was deciding a Federal question. The decision of the Court is placed solely upon other grounds and is entirely a case of contract law.

This being so, it would seem to follow under the decisions that this Court cannot take jurisdiction of this case, for by the terms of the statute (Sec. 709) it is necessary that there should be a decision of the highest court of the State against the " title, right, privilege or immunity " claimed, and, if there is no decision upon the question, then a necessary ground of jurisdiction is wanting.

In *Cook County vs. Calumet & Chicago Canal Co.*, 138 U. S., 635, 651, the Chief-Justice delivering the opinion of the Court said :

" The rule is settled that to give this Court jurisdiction of a writ of error to a State Court it must appear affirmatively, not only that a Federal question was presented for decision by the highest court of the State having jurisdiction, but that its

decision was necessary to the determination of the cause, and *that it was actually decided*, or that the judgment as rendered could not have been given without deciding it. *De Saussure vs. Gailard*, 127 U. S., 216; *Johnson vs. Risk*, 137 U. S., 300. Tested by this rule this writ of error cannot be sustained."

See, also,

Bushnell vs. Crooke Mining Co., 148 U. S., 682.

San Francisco vs. Itsell, 133 U. S., 65.

(d.)

THE MERE FACT THAT THE RAILROAD COMPANY EXPECTED TO OBTAIN A PATENT FOR THE LAND IN QUESTION DOES NOT CREATE A FEDERAL QUESTION WITHIN THE MEANING OF SECTION 709.

Because a case in a State Court indirectly and in some remote way relates to a question of a United States patent, is no ground for this Court taking jurisdiction.

In *Gill vs. Oliver's Executors*, 11 How., 529, it appeared that some time prior to 1817, Goodwin and others, under the name of the Baltimore American Company, agreed with a Mexican general named Mina to prepare a military expedition against the Spanish authorities in Mexico. After Mexico became a republic she recognized the services of Goodwin and awarded to him and his associates a large sum of money under the convention between the United States and Mexico. Gill claimed as assignee of Goodwin prior to his insolvency, and Oliver asserted title to the money under an assignment made by Goodwin subsequent to his insolvency. The highest Court of the State decided that the contract between Goodwin and Mina, being in violation of the neutrality laws of the United States, was not a subject of property and could not pass by force of the insolvent law of Maryland to Gill, his assignee. The case was brought to this Court by writ of

error, where it was dismissed for want of jurisdiction. Mr. Justice GRIER delivered the opinion of the Court and said at pages 546 to 548 :

“ That the Baltimore Mexican Company set on foot and prepared the means of a military expedition against the territories and dominions of the king of Spain, a foreign prince with whom the United States were at peace, is a fact in the history of the case not disputed, and which, if wrongfully found by the Court, would not give us jurisdiction of the case. * * *

“ The treaty and award are facts in that history. They were before the Court but as facts and not for construction. *If A hold land under a patent from the United States or a Spanish grant ratified by treaty, and his heirs, devisees or assigns dispute as to which has the best title under him, this does not make a case for the jurisdiction of this Court under the 25th section of the Judiciary Act. If neither the validity nor construction of the patent or title under the treaty is contested, if both parties claim under it, and the contest arises from some question without or de hors the patent or the treaty, it is plainly no case for our interference under this section.*

“ That the title originated in such a patent or treaty is a fact in the history of the case incidental to it, but the essential controversy between the parties is without and beyond it. * * *

“ It is a conclusive test of the question of jurisdiction of this Court in the present case, that if we assume jurisdiction, and proceed to consider the merits of the case, we find it to involve no question either of validity or construction of treaties or statutes of the United States.”

So, in the case at bar, the patent to this land and the Act of 1866 are merely facts in the history of the case.

Neither one nor the other was presented below or comes up here for construction, and any consideration of the merits of the case shows that it involves no question of the validity of the Act of 1866 or of any patent from the United States, but is a simple case of the construction of a contract.

A writ of error to the Supreme Court of Michigan was dismissed by this Court in *Michigan vs. Flint & Péré Marquette Rd. Co.*, 152 U. S., 363, in which the State of Michigan claimed certain lands under and by virtue of a grant by Act of Congress. The Supreme Court of Michigan held that the State was estopped from claiming title to the lands, and that was the only question decided by it. Mr. Chief-Justice FULLER, in delivering the opinion of the Court, said, at page 368 :

“ As its judgment thus rested upon the decision of a question which was not Federal, this Court has no jurisdiction to review it, and the writ of error must be dismissed.”

The present case and the case just cited are somewhat similar. In each there was a claim of title under a grant from Congress, and in each the decision of the case was placed by the State Court upon a ground in no way connected with such Act of Congress. It is difficult to see how the case at bar can escape in this court the fate of the Michigan case, and we think it should be dismissed for the reasons given in the latter case.

POINT III.

If this Court can take jurisdiction of this case, then the judgment of the Supreme Court of California should be affirmed.

The contracts on which this suit was brought provided that Allen should pay one-fifth of the purchase money at the time the contracts were signed (February 1st, 1888), and the remaining four-fifths five years thereafter (February 1st, 1893), and that the railroad company should convey the land to Allen after the receipt of a patent therefor from the United States. Beyond this latter provision no time was specified within which the conveyance was to be made.

It was also stated in the agreements that the railroad company did not then have patents for the lands, but that it would use ordinary diligence to procure them; that it often failed to obtain from the Government patents to lands which clearly seemed to belong to it, and that, if it was finally determined that patents should not issue to the railroad company for this land, it would repay to Allen (without interest) the amount paid by him on account of the purchase price (the use of the land by Allen to offset the use of the money by the railroad company).

Although the complaint sought to recover simply the installments of interest upon the unpaid purchase money due upon the 1st day of February, 1889, 1890 and 1891, respectively, yet at the time of the trial of the case—viz., April, 1893—the balance of the purchase money had become due and the relations between the parties were considered as of the time the case was tried, and not as of the time when the suit was commenced.

The contention of the plaintiff below, which was sustained by the trial Court, was that the covenant on the part of Allen to pay the interest and the balance of the

purchase money due on February 1st, 1893, was independent of the covenant on the part of the railroad company to convey the land to Allen under a patent from the United States, and that the balance of the purchase money became due upon the 1st of February, 1893, and should then be paid without regard to whether the railroad company had then obtained a patent on the lands from the United States and was in a position to convey the same to Allen. In other words, the two covenants did not in any way depend upon each other, and the obligation of Allen to pay the interest and the balance of the purchase money on the 1st of February, 1893, still remained, even if the railroad had not conveyed or could not then convey the land to him, and was not incumbent upon the railroad company to show as a condition precedent to the recovery of the balance of the purchase money that it had made, or had offered or was ready to make, a conveyance of the land.

The only duty resting upon the railroad company was to use ordinary diligence to obtain a patent from the United States, and, after its receipt, to convey the land to Allen. The finding of the trial Court was that the railroad company "*had not been guilty of any want of ordinary diligence in instituting or prosecuting*" proceedings to obtain patents; that proceedings were then pending before the proper department of the Government of the United States, and that it had not been finally determined therein that a patent should not issue therefor. It is to be observed that the Government did issue a patent for this land to the railroad company on the 1st day of December, 1894.

Upon the appeal to the Supreme Court of California in department, the view of the Court seemed to be that the two covenants were dependent on each other, and if the railroad company had not obtained a patent for this land by the 1st of February, 1893, and was not then ready and able to convey this land to Allen, that then Allen was under no obligation to pay to it the interest or the balance of the purchase money which

fell due upon that day, and was entitled to be repaid the fifth of the purchase money paid by him at the time the contracts were executed on the 1st of February, 1888. In other words, the Court injected into the contract a condition not to be found in the instrument itself—to wit, that the railroad company was bound to obtain from the United States a patent for this land within five years from the date of the contract, and, if it failed to do so, Allen was under no obligation to pay the balance of the purchase money and the unpaid interest, and was entitled to repayment of the sum advanced at the time of the execution of the contract and to a rescission of the contract.

Upon the hearing of the case by the Supreme Court of California in bank the decision of the Court in Department was reversed and the final decree of the trial Court was affirmed, it being held that the two covenants were entirely independent, and that Allen's obligation to pay the balance of the purchase money due on February 1st, 1893, was unaffected by the question of whether the railroad company had then obtained a patent from the United States and could convey the land thereunder to Allen.

It is to be noticed as showing that no Federal question was presented to or in the mind of the Court when it decided the case that it is stated in the opinion of the Court below, sitting in bank, at page 16 of the record, that

"The only question involved in the case is as to the construction of the contracts sued on."

There would seem to be no opportunity to discuss in this Court the question of whether the railroad company had or did not have title to these lands at the date of the execution of the contracts. The plain finding of the trial Court was that the railroad company did own the lands at such time. None of the evidence upon which that finding was made is incorporated in the record, and on the appeal in the State Court this question was not discussed, the State Court no doubt considering that it had no bearing

upon the question before it, and even if it did that the Court was bound by the findings of the trial Court. Further than that the United States has now granted to the railroad company a patent for the land so that all question as to whether the railroad company had the title to this land or not is now entirely removed from this case.

There is also nothing in the other findings which in any way disturbs the finding of the trial Court that the railroad company owned the lands in question. It may be urged by the plaintiff in error that the order of the Secretary of the Interior, made in 1867, withdrawing these lands from sale or settlement under the laws of the United States was revoked by an order made in 1887 and the lands restored to the public domain, as appears by one of the findings, and that therefore the railroad company could have no title thereto. It is, however, also found "that the loss to plaintiff of odd-numbered sections within said granted limits, *i. e.*, within twenty miles of said railroad, because of the various exceptions and reservations in said act provided for, is fully equal to all the odd-numbered sections within said indemnity belt."

It being found by the trial Court that the railroad company could not make up the losses in the primary limits, even if it had every odd-numbered section in the indemnity belt, it necessarily follows that all of these indemnity sections were appropriated by the grant without any action on the part of the Secretary of the Interior or selection by the company, as was decided in *St. Paul and Pacific Railroad Company vs. Northern Pacific Railroad Company*, 139 U. S., 1, 19, where it was said:

"As to the objection that no evidence was produced of any selection by the Secretary of the Interior from the indemnity lands to make up for the deficiencies found in the lands within the place limits, it is sufficient to observe that all the lands

within the indemnity limits only made up in part for these deficiencies. There was, therefore, no occasion for the exercise of the judgment of the Secretary in selecting from them, for they were all appropriated."

This decision was followed in *United States vs. Colton Marble & Lime Co.*, 146 U. S., 616, and it would therefore appear from these findings that the lands were actually appropriated under this grant.

Then, again, the finding of the revocation by the Secretary of the Interior of the order of withdrawal from sale had no effect whatever upon this title, as was held in *St. Paul and Pacific Railroad Company vs. Northern Pacific Railroad Company* (*supra*), in which was involved the grant to the Northern Pacific Railroad in substance the same as the Atlantic and Pacific Act. The Court there said at pages 17 and 18 that

"The Northern Pacific act directed that the President should cause the lands to be surveyed forty miles in width on both sides of the entire line of the road, after the general route should be fixed, and as fast as might be required by the construction of the road, and provided that the odd sections of lands granted should not be liable to sale, entry or pre-emption before or after they were surveyed, except by the company. They were therefore excepted by that legislation from grants, independently of the withdrawal by the Secretary of the Interior. His action in formally announcing their withdrawal was only giving publicity to what the law itself declared. The object of the withdrawal was to preserve the land unencumbered until the completion and acceptance of the road."

Upon the findings, therefore, of the trial Court, entirely independent of the patents since issued by the

Government to the railroad company, it is evident that the defendant in error had title to these lands, and there can be no question but that the contracts were valid and founded upon a sufficient consideration, and, as the State Court has said, "*the only question really involved in the case is as to the construction of the contracts sued on.*" In other words, when it comes to an examination of the merits of this case it is impossible to find any federal question in it or to make out of it anything but a simple case of contract.

The terms of the contracts are clear enough. The time for the payment of the purchase money by Allen is definitely fixed. One-fifth thereof was paid on February 1st, 1888. Four-fifths thereof was to be paid on February 1st, 1893. The time for the conveyance of the land by the railroad is also fixed—viz., after a patent therefor is procured by the railroad company from the United States. The contract contemplates the possibility that the plaintiff might not obtain a patent to the lands from the United States, and it is therefore definitely fixed when, in such a contingency, the contract should be terminated—to wit, when it was finally determined that a patent shall not issue to the railroad company. In that event the money paid on account of the purchase price was to be returned without interest.

The plaintiff in error will of course maintain, as he did below, that the true construction of this contract is that, if the patent from the United States is not procured within five years, the money paid on account of the purchase price must be returned to him and the contract rescinded. There is, however, no such provision in the contract. Neither is the contract uncertain upon this point. It expressly provides that the purchase money shall be returned when it is finally determined that the patent will not issue. This is the only time set for the termination of the contract. This event might have occurred and the claim of the railroad company to this land might have been finally

rejected by the Government prior to the 1st of February, 1893, when the balance of the purchase money was due. Then and in that case the railroad company was bound to repay Allen the one-fifth of the purchase price paid at the time of the execution of the contracts. On the other hand, it might not have been finally determined that the railroad company was not entitled to a patent until after the 1st of February, 1893, in which case the first payment of February 1st, 1888, on account of the purchase price, and the final payment of February 1st, 1893, must then be refunded by the railroad to Allen. That is to say it was contemplated by the contract that the time of procuring the patent was necessarily uncertain; that it might be obtained after the expiration of five years from the date of the contract or it might be obtained before. If before, then Allen would be entitled to a deed before he paid four-fifths of the purchase price. If after, then the railroad was entitled to the purchase money on February 1st, 1893, without making a conveyance of the lands to Allen, and Allen was entitled to a deed whenever the railroad company received a patent for the land or to be repaid the money paid by him on account of the purchase price whenever it was finally determined that a patent would not issue.

These contracts are in no way ambiguous or uncertain in their terms, and the covenant in each to pay the purchase money is as independent of the covenant to convey the property as it is possible for language to make it. Allen agreed to pay the purchase money at a specified time; viz., February 1st, 1893. The railroad company agreed to convey at a stated time; viz., when it obtained a patent for the land from the United States.

It may, however, be argued that the time for the conveyance by the railroad is not fixed. We think it is. The contract particularly provides that the land shall be conveyed when the patent is obtained, whether before or after the payment of the purchase price, but,

even if the plaintiff in error were right in his contention, we do not see that it changes in any way the obligation upon the part of Allen to pay the purchase money on February 1st, 1893, without regard to the ability of the railroad company to then convey the property under a United States patent. In other words, the two covenants are separate and independent, and each is to be performed without regard to the other.

In *Loud vs. Pomona Land and Water Company*, 153 U. S., 564, the facts were as follows: The Pomona Land and Water Company made a contract with Loud by which it was to convey to him certain land upon the performance by him of certain covenants, among which was a covenant to pay the purchase price of \$10,155 in the following manner: \$2,539 on or before delivery of the contract; \$3,808 on or before April 8, 1888; \$3,808 on or before April 8, 1889.

Loud having failed to pay the purchase money, the land company brought an action against him in the United States Circuit Court for the Eastern District of Michigan, to recover the amount and alleged in the declaration that it was ready and willing, upon the making of the payments by Loud, to convey the land to him. There was no averment in the declaration of any tender by the water company of any conveyance of the land.

As a special defense the defendant set up "that the plaintiff did not, on the day when the last installment of the purchase price was made payable by the terms of said alleged contracts respectively, nor at any time, convey or tender a conveyance of the land * * * described in said contracts."

Upon the trial the Court directed a verdict for the plaintiff for the amount due and unpaid upon the contracts, and the defendant brought the case by writ of error to this Court, where the judgment was affirmed. The great discussion in the case seems to have turned upon the question whether the covenant to convey and the covenant to pay the purchase price were dependent

or independent, and whether the payment of the purchase price when it fell due could be compelled without any regard to the conveyance of or an offer to convey the land in question, and this Court was very clear in its decision that the two covenants were entirely independent of each other. Mr. Justice JACKSON delivered the opinion of the Court and said at pages 576 to 578 :

“ The question whether covenants are dependent or independent must be determined in each case upon the proper construction to be placed on the language employed by the parties to express their agreement. If the language is clear and unambiguous it must be taken according to its plain meaning as expressive of the intention of the parties, and under settled principles of judicial decision should not be controlled by the supposed inconvenience or hardship that may follow such construction. If parties think proper, they may agree that the right of one to maintain an action against another shall be conditional or dependent upon the plaintiff's performance of covenants entered into on his part. On the other hand, they may agree that the performance by one shall be a condition precedent to the performance by the other. The question in each case is, which intent is disclosed by the language employed in the contract ?

“ In this case there is no ambiguity in the language of the contracts. The covenant and agreement of the land company is that ‘ *after* the making of the payment and full performance of the covenants hereinafter to be made and performed by the party of the second part (Loud), the party of the first part (the land company) will, in consideration thereof, convey by deed of grant, bargain and sale to the party of the second part, his heirs or assigns,’ the described

lands, together with the designated shares in the irrigation companies. A subsequent clause of the contract provides that 'this instrument is not and shall not be construed as a conveyance, equitable or otherwise, and until the delivery of the final deed of conveyance, *or tender of all payments precedent thereto*, the party of the second part, his heirs or assigns, shall have no title, equitable or otherwise, to said premises,' and it is further provided that time is of the essence of the contract.

"If these terms and provisions of the contracts are to be understood in their plain and obvious meaning, they clearly express the intention of the parties to be that the purchaser shall first pay the purchase price of the lands contracted for before he is entitled to demand a conveyance therefor. It is also clear that the purchaser (the defendant below) could not have legally demanded from the land company a deed or conveyance for the lands until after the purchase money had been fully paid. The payment or tender of payment of the purchase price for the land was a condition precedent to the right to the conveyance. The authorities, both in England and in this country, fully sustain this construction of the contract. A brief reference will be made to some of the principal cases on the subject.

"In the learned note of Serjeant Williams to the early case of *Pordage vs. Cole*, 1 Saund., 320*a*, it is said that 'if a day be appointed for payment of money, or part of it, or for doing any other act, and the day *is* to happen, or *may* happen, *before* the thing which is the consideration of the money, or other act, is to be performed, an action may be brought for the money or for not doing such other act *before* performance; for it appears that the party relied upon his *remedy*, and did not intend to make *performance* a condition precedent; and

so it is where *no time* is fixed for performance of that which is the consideration of the money or other act."

In *Donovan vs. Judson*, 81 Cal., 334, the plaintiff sued to recover the purchase price of certain land. The contract for the sale of the land was entered into between Margaret Donovan and the defendant Judson on March 24th, 1873, and among other things the defendant Judson agreed to pay the purchase price "within fifteen months after final judgment for plaintiff shall have been entered in the case of *Egbert Judson vs. Paul Malloy et al.*" Final judgment in the action of Judson vs. Malloy was entered and all litigation therein ended, on March 27th, 1873. Margaret Donovan died shortly after making the contract on the 23d of June, 1873. On the 11th of June, 1885, the probate Court directed the plaintiff Donovan, as administrator of Margaret Donovan, to make a deed to the defendant of the premises pursuant to the terms of the agreement. This was done and defendant took possession of the property, but declined to pay for it. On the 24th of July, 1886, this action was begun and the defendant demurred to the declaration upon the ground that the case was barred by the Statute of Limitations, inasmuch as the cause of action accrued against him fifteen months after the final judgment in the case of *Judson vs. Malloy*, viz., some time in 1874, and more than four years before the action was commenced. In other words, the defendant claimed that the covenant of payment and the covenant to convey were independent and that the payment became due at the time specified (15 months after final judgment in *Judson vs. Malloy*), without regard to the conveyance of the property. The demurrer was overruled, the case tried and a judgment entered in favor of plaintiffs. Upon appeal the judgment was reversed and the Court said at pages 337 and 338 :

" Counsel for respondent contended that no cause of action accrued against appellant until a conveyance of the interest of Margaret Dalton in the premises was executed to Judson; that the execution of such a conveyance was a condition precedent to the right to demand the sum which he covenanted to pay. By reference to the agreement it will be seen that Judson agrees to pay the sum specified 'within fifteen months after final judgment for plaintiff should have been entered in the case of Egbert Judson v. Paul Malloy *et al.*' The covenants to convey and to pay are independent covenants. No time is fixed for the execution of the conveyance. It might be executed before or after the time fixed for the payment of the sum to be paid by Judson. Had it been executed before that time no cause of action would have accrued for the recovery of the money before the time fixed for its payment. No time is fixed for the execution of the conveyance, and the case is clearly within the rule stated by Sergeant Williams in his note to *Pordage v. Cole*, 1 Saund., 320, which has been accepted in England and this country as a correct explication of the law on this question. He says: 'If a day be appointed for payment of money, or a part of it, or for doing any other act, and the day is to happen or *may* happen *before* the thing which is the consideration of the money or other act is to be performed, an action may be brought for the money, or for not doing such other act *before* performance, for it appears that the party relied upon his *remedy*, and did not intend to make the *performance* a condition precedent, and so it is where *no time* is fixed for performance of that which is the consideration of the money or other act.' In this case *no time* is fixed for the execution of the conveyance which Margaret Dalton covenants to execute to Judson. It is, therefore, clear that he did not intend to

make the performance of that covenant a condition precedent to the payment which he covenants to make at a specified time. In none of the many cases in which covenants have been held to be independant covenants were they more clearly so than in this case."

In *Front Street M. & O. R. R. Co. vs. Butler*, 50 Cal., 574, the defendant agreed to pay the plaintiff a certain sum of money in case the latter built a street railroad past his house. Ten per cent. of the amount was to be paid upon the beginning of the work, ten per cent. on the completion of four blocks west of a certain street, ten per cent. when the line should have been completed to a point opposite his house and ten per cent. in equal monthly payments thereafter. There was also a provision in the contract that the railroad should be completed within six months. The road was not completed within the six months required by the contract. The plaintiff brought an action to recover the amount due from the defendant under the agreement and was nonsuited below upon the ground that the road had not been completed in time. Upon appeal the judgment below was reversed upon the ground that the covenants were independent. The Court said at page 577 :

"The covenant to make monthly payments, after the first three payments, was independent—at least so far as the installments might become due prior to the expiration of the six months. The payment of money cannot be made dependent on the performance by the other party of a condition, which, by the very terms of the contract, is not to be performed, or may not be performed until after the date at which the money is to be paid."

The case of *Reid vs. Davis*, 4 Ala., 83, is very similar in its facts to the case at bar and was an action to enforce the payment of *purchase money payable by a day certain under a contract conditioned to make title "as*

soon as a patent therefor should be obtained from the United States." It was sought to defend the action upon the ground that no possession was taken under the contract, and that the defendant had demanded a title which was refused, and that the contract was rescinded. The defense was overruled. The Court said :

. "The fact that the defendant below never was in the actual occupancy of the land which he had purchased cannot relieve him from liability to pay the purchase money. His contract gave him the right of entry and enjoyment, and these invested him with the constructive possession.

* * * *The condition of the plaintiff's bond did not oblige him to complete the title by any definite time, but when he should obtain a patent of land from the United States. This was an undertaking to do an act upon an event which would happen, but the time when was uncertain ; and, before the obligor could be put in default for its non-performance, it must appear that the event has actually taken place, or has (at least) been delayed by his act or omission.*

"The evidence recited in the bill of exceptions does not show that the plaintiff has done or omitted to do anything to prevent the issuance of patent, according to the regular order of business in the Land Office, and, in the absence of all proof, we must intend that no fault is attributable to him. We must, then, suppose that the demand of a title was premature, and its refusal, under the circumstances, can avail nothing.

* * * If the defendant could, at his election, under any circumstances, rescind the contract for the refusal of the plaintiff to make a title, where the money was not tendered (a condition which we do not admit), he certainly could not in the present case, when the plaintiff was under no obligation to yield to his demand. Where the vendor of land executes a bond conditioned

to make title generally, and the vendor, in consideration thereof, makes his note payable to the vendor on a day certain, the failure to complete the title is not in itself a bar to an action on the note (*George & George vs. Stockton*, 1 Ala. Rep., 136; *Stone vs. Gover*, *Ibid.*, 287). And a vendee who holds the bond of his vendor, conditioned for the conveyance of a title upon a future event which has not happened, cannot occupy a more favorable position."

The plaintiff in *Campbell vs. Jones*, 6 Term Rep., 570, agreed to teach the defendant a certain mode of bleaching linen in consideration of the payment by the defendant of £250, and the further payment of £250 on the 25th of February, 1794, or sooner, if before that date the plaintiff should have instructed the defendant in bleaching linen. The plaintiff, after the 25th of February, 1794, sued the defendant to recover the second instalment of £250 without averring that he had taught the defendant how to bleach linen. The defendant demurred to the complaint, and the demurrer was overruled upon the ground that the covenants were independent and that the plaintiff was entitled to recover the second payment of £250 without regard to whether he had taught the defendant how to bleach linen or not. Lord KENYON in the course of his opinion said at page 572 :

"The judgment of the Court must be in favor of the plaintiff, if upon the true construction of the deed a certain day be fixed for the payment of the money, and the thing to be done may not happen until after. The plaintiff in this case covenants with all possible expedition, not by any fixed time, to instruct the defendant in bleaching linen, &c., and in consideration of the plaintiff's covenants "the defendant covenants that he will on or before the 25th of February, or sooner, in

case the plaintiff should before that time have instructed the defendant, pay him the further sum of £250." To support the construction contended for by the defendant this covenant must be understood as if it had been written thus, "and the said Griffiths, the defendant, doth hereby covenant that he will on or before the 25th of February, in case the plaintiff shall before that time have instructed him, pay the further sum of £250," which is in effect covenanting to pay the money as soon as the plaintiff should have instructed him. Now, had this been the intention of the parties, the natural and obvious way of expressing such intent would have been for the defendant to covenant to pay as soon as he should be taught, but if the design of the parties were that the plaintiff at all events should be paid on the 25th of February, and sooner in case the defendant should be sooner instructed, the expression here used is a natural expression, and the words "in case the said Hector, the plaintiff, should before that time have instructed the said Griffiths," the defendant will be confined to the word "sooner."

In *Couch vs. Ingersoll*, 2 Pickering, 292, the plaintiff and defendant agreed, in March, 1822, to make an exchange of lands. The defendant agreed to give possession of his land on the 1st of April, and the defendant was to select his land on the 1st of July following. It was held that the two covenants were independent and that plaintiff could sue the defendant for failure to deliver possession upon the 1st of April without any regard to his own covenants. Judge WILDE delivered the opinion of the Court and said at page 300 :

"In the first place, it is clear that the first act was to be done by the defendant. He was to deliver possession of the lands in Lee and in the State of New York by the first day of April next after

the date of the contract ; and nothing was to be done or performed by the plaintiff until after that time. This, therefore, is an independent covenant, and it is unnecessary for the plaintiff to show or aver performance of the covenants on his part. If a day is appointed for performing a covenant on one part, and it is to happen or may happen before the covenants on the other part are to be performed, the covenants are independent."

In *Bean vs. Atwater*, 4 Conn. Rep., 3, the facts were as follows : The plaintiff, on the 26th day of August, 1816, granted and sold to the defendant certain land in consideration of certain covenants to be performed and payments to be made by the defendant, and covenanted to give him a deed therefor on the 1st of June, 1817. The defendant agreed to pay on the land the sum of \$4,000, \$500 of which was to be paid immediately, \$500 on the 1st of January, 1817, \$500 on the 1st of June, 1817, and the other payments at different dates thereafter. Upon the trial of the action brought by the plaintiff to recover the money, it was held that the covenant to pay the first two installments of money was independent of the covenant to convey and that the plaintiff was entitled to recover the sum due thereon without averring or proving performance of the covenant on his part. At page 10, in the opinion of Chief-Justice HOSMER, it was said :

" It is a primary and fundamental rule concerning contracts that their construction must be according to the intention of the parties ; and so paramount is this rule that to such intention even technical words must give way. When the inquiry is in relation to their dependence or independence this is to be collected from the evident sense and meaning of the parties ; and, however transposed they may be in the covenants, their precedence must depend on the order of time

in which the intent of the transaction requires their performance.

"If the language of a contract will admit of it, justice and general convenience incline to the construction of a simultaneous performance; but, if a man will agree to pay his money before he has the thing for which he ought to pay it, and will rely upon his remedy, this is a law of his own making, and his agreement he ought to perform. * * *

To investigate the intention of parties to a contract, certain auxiliary rules have been established. It was laid down by Lord HOLT in *Thorpe vs. Thorpe*, 1 Ld. Raym., 665, and since has been uniformly recognized, that if a day be appointed for payment of money, and the day must happen or may happen before the consideration of the money is to be performed, an action lies for the money before performance. The reason has already been assigned; it is that the party relied on his remedy, and did not intend the performance to be a condition precedent."

In the case of *Coleman vs. Rowe*, 5 How. (Miss.), 460, 466, the Court say--and this is the rule which has been followed by the Supreme Court of California :

"The general rule appears to be that the intention of the parties, to be gathered from the whole contract, is the criterion of the question. Thus, where a day is fixed for the payment of money, or part of it, and the day is to happen, *or may happen*, before the thing which is the consideration of the money is to be performed, an action may be brought for the money before performance; for it appears that the party relied upon his remedy."

In *Seers vs. Fowler*, 2 Johns. Rep., 272, the plaintiff, on the 5th of February, 1805, agreed to build and finish a house for the defendant before November 1st, 1805,

and the defendant agreed to pay therefor \$750 on the 1st of May, 1805, and the balance of the purchase money as soon as the house should be completed. Plaintiff sued for the installment due upon the 1st of May, 1805, and it was held that he was entitled to recover. In the opinion of the Court it was said :

“ The covenants contained in the articles upon which this suit is founded must be considered mutual and independent. * * * The plaintiff's right of action for the 750 dollars accrued on the first of May ; but at this time he could not aver a performance on his part, nor was he under any obligation to have been in a situation to make the averment. Where parties, therefore, by their contract place themselves in this situation, their covenants must necessarily be considered mutual and independent, so as not to render it necessary to aver performance.”

A case very similar in its facts to the one just cited is *Terry vs. Duntze*, 2 H. Bl., 389, 392, where it was said : “ Now, it is a rule long established in the construction of covenants, that, if any money is to be paid before the thing is done, the covenants are mutual and independent.”

The following cases sustain the doctrine that where money is to be paid on a specified day, and the consideration for which the money is to be paid, may or may not be performed until after the date appointed for the payment of the money, the covenants are independent and the money, if not paid when due, can be recovered without proof of the performance of or of the offering to perform the consideration :

Brashier vs. Gratz, 6 Wheat., 528, 538.

Eddy vs. Davis, 116 N. Y., 247.

Paine vs. Brown, 37 N. Y., 228.

Adams vs. Wadhams, 40 Barb., 225.

Northrup vs. Northrup, 6 Cow., 296.

Robb vs. Montgomery, 20 Johns, 15.

Harrington vs. Higgins, 17 Wend., 376.

Slocum vs. Despard, 8 Wend., 615, 619.
 Tompkins vs. Elliot, 5 Wend., 496.
 Hill vs. Grigsby, 35 Cal., 662.
 Lord vs. Belknap, 1 Cush., 279.
 George vs. Stockton, 1 Ala., 136.
 Stone vs. Gover, 1 Ala., 287.
 Sayre vs. Craig, 4 Ark., 16.
 Mayers vs. Rogers, 5 Ark., 417.
 Wright vs. Blachley, 3 Ind., 101.
 Platt vs. Gilchrist, 3 Sand., N. Y., 125.
 McCoy's Administrators vs. Bixbee's Administrators, 6 Ohio, 310.
 Edgar vs. Boies, 11 S. & R., 445.
 Manning vs. Brown, 10 Me., 49.
 Bank of Sparta vs. Agnew, 45 Wisc., 131.
 Gale vs. Best, 20 Wisc., 44, 48.
 State vs. Winona & St. Peter R. R. Co., 21 Minn., 472.
 Lowry vs. Mehaffy, 10 Watts, 387.
 Battey vs. Beebe, 22 Kansas, 81.
 Bailey vs. Clay, 4 Randolph (Va.), 346.

It would seem clear from this review of the authorities that, in the present case, the railroad company was entitled to recover the balance of the purchase money under these contracts due from Allen upon the 1st of February, 1893, even if it had not then obtained a patent for the land from the Government, and was not then in a position to give Allen a deed to the property in pursuance of the agreement between them to give such deed whenever the railroad company obtained a patent for the land.

(*u.*)

It may be argued in this court, as it was in the court below, that the railroad company by bringing this action and by asking for the relief demanded in its complaint rescinded this contract. In other words, the appropriateness of the remedy in this case may be criticised by the plaintiff in error upon the ground that an action for foreclosure could not be brought, because there was nothing due plaintiff at the time the action was

commenced except payments of interest which were due upon the deferred principal.

We understand this objection to be disposed of by the case of *Hansbrough vs. Peck*, 5 Wall., 497, in which the parties had agreed upon the sale of certain lots in Chicago for \$134,000. The purchase money was payable in installments of \$4,300, except the last, which was for \$90,000 and was payable April 28th, 1861, some four years and three months from the date of the contract, together with semi-annual interest at the rate of ten per cent. per annum. Time was in terms made the essence of the contract in respect to payments. Under this contract the purchasers went into possession, and laid out \$18,000 in improving the property. After erecting these improvements and paying two years' interest, the purchasers, becoming embarrassed or dissatisfied with their contract, were desirous of surrendering it, but were persuaded by the vendor to remain, and they paid the interest for another year, the last payment of interest being made on the 31st of January, 1860. After that no further payments were made, and April 21, 1861, before the time fixed for the payment of the principal, the vendor filed a bill in chancery in the State Court to prevent the removal of the buildings from the premises and to get possession of the property. At the time this suit was brought the purchaser was in default for nonpayment of about a year's interest, and the principal was not due, although it fell due a few days after the filing of the bill. On the 23d of August, 1862, a decree was entered restraining the removal of the buildings and putting the vendor into possession. After the rendition of that decree the defendant in the first case and the plaintiff here brought suit to recover back the money which he had paid on that contract, and also for the value of the improvements made, claiming, as is claimed here, that the first suit was really a suit for rescission, and that, having been rescinded, he was entitled to have restored

to him what he had paid upon it. Upon this point the Court said as to the first suit :

“ It is a proceeding in affirmance, not in rescission of it [the contract] by enforcing a remedy expressly reserved in it. Indeed, without such clause or reservation the remedy would have been equally available to him. It is a right growing out of the default of the purchaser, as the law will not permit him both to withhold the purchase money and keep possession and enjoy the rents and profits of the estate ; nor will it subject the vendor to the return of the purchase money, if he is obliged to go into a court of equity to be restored to the possession.

“ In case of a default in the payments there are several remedies open to the vendor. He may sue on the contract and recover judgment for the purchase money and take out execution against the property of the defendant, and, among other property, the lands sold ; or he may bring ejectment and recover back the possession ; but, in that case, the purchaser, by going into a court of equity within a reasonable time, and offering payment of the purchase money, together with costs, is entitled to a performance of the contract ; *or the vendor may go in the first instance into a court of equity, as in the present case, and call on the purchaser to come forward and pay the money due, or be forever thereafter foreclosed from setting up any claim against the estate. In these contracts for the sale of real estate the vendor holds the legal title as a security for the payment of the purchase money, and, in case of a persistent default, his better remedy, and, under some circumstances, his only safe remedy, is to institute proceedings in the proper court to foreclose the equity of the purchaser where partial payments or valuable improvements have been made. The Court will usually give him*

a day, if he desires it, to raise the money, longer or shorter, depending on the particular circumstances of the case, and to perform his part of the agreement. * * * And no rule in respect to the contract is better settled than this: That the party who has advanced money or done an act in part performance of the agreement, and then stops short and refuses to proceed to its ultimate conclusion, the other party, being ready and willing to proceed and fulfil all his stipulations according to the contract, will not be permitted to recover back what has thus been advanced or done."

(b.)

It was insisted in the Court below that the provision in the contracts "that in case it be finally determined that patent shall not issue" was too indefinite, and that the contract might run forever. One answer to this is that a patent for this land has long ago been issued to the railroad company (viz., on December 1st, 1894); but, even if it had not been, the argument made by plaintiff in error in the lower Court in support of the suggestion of indefiniteness, that the principle of *res adjudicata* is not applied in the Land Department; that one Secretary can reverse another, and that there is no such thing as a final determination of the question whether a patent should issue, is without any force whatever.

There is nothing better settled in the Land Department than that it follows the principle of *res adjudicata*, just as this Court and every Court does. In the case of Kopperud, Vol. 10, Decisions of the Interior Department, page 93, an application was made to have a former decision rendered by Mr. Secretary Vilas overturned or repudiated, and a new order made. The application was denied, and Assistant Secretary Chandler in his decision said:

"Moreover, said decision was rendered by Mr. Secretary Vilas, and I am unaware of any rule of law that will warrant one head of a Department to reverse the final action of his predecessor, except in certain well-defined cases which are not present in the case at bar. In the case of Henry T. Wells (3 L. D., 196), Mr. Secretary Teller said :
 " ' If, as I think was the fact, Wells' whole claim was before Secretary Delano and passed upon in his decision, then that decision was final and conclusive, and the present claim is *res adjudicata* so far as this Department is concerned. It matters not that that decision may have been erroneous, or that the Department has since held differently. It is sufficient that it was a decision.' "

(c.)

At pages 26 to 28 and at page 62 of his brief the plaintiff in error maintains that there was a direct misrepresentation upon the part of the railroad company in the clause of the contract which reads as follows :
 " It is further agreed between the parties hereto that the party of the first part claims all the tracts hereinbefore described as part of a grant of lands to it by the Congress of the United States " (Rec., p. 5). The contention of the plaintiff in error is that the lands in question were not in fact granted by the United States to the railroad company by the Act of July 27, 1866 (14 Stat. at Large, 292), inasmuch as they were indemnity lands, while the Act of Congress only granted lands within the primary or place limits, and that the claim of the railroad company in its contract that the lands were granted to it by such act was a direct misrepresentation as to its title thereto.

It is not plain how such a clause can be considered a misrepresentation, as it is merely a statement by the railroad company that it claimed that the land in question was part of a grant to it ; but, even if such a clause can in any way be deemed a misrepresentation,

it is not clear how it can now be considered in view of the finding of the trial Court that the land in question was granted to the railroad company by the Act of July 27, 1866 (Rec., p. 11), and the absence in this record of all the evidence upon which such finding was based.

If, however, this Court should feel called upon to consider this question, it seems to be simply whether lands within the indemnity belt referred to in the Act of July 27, 1866 (14 Stat. at Large, 292), were granted by such act to the railroad company, or whether such act granted only the lands within the place or primary limits.

It is difficult to see how the construction of such an act, in one way or the other, by both the parties to a contract could be considered a misrepresentation by one of the parties, but the claim of the railroad company that the lands in question were granted to it by such act has been sustained by the issue to it of a patent therefor by the United States, on the 1st of December, 1894.

Further than that, it has been held many times that the expression "lands hereby granted," found in Section 6 of the act referred to, includes indemnity lands as well as place lands.

In *Northern Pac. R. Co. vs. United States*, 36 Fed. Rep., 282, 287, Mr. Justice BREWER, then Circuit Judge, said :

"Again, with reference to the suggestion that the expression 'lands granted' ordinarily refers in land legislation to lands in place, the truth is that the expression has a double meaning. Its narrower one is, of course, lands in place; but it is frequently used to include all lands donated by the Government, whether lands in place or indemnity lands (*Barney vs. Railroad Co.*, 24 Fed. Rep., 889; *Railroad Co. vs. Railroad Co.*, 112 U. S., 730; 5 Sup. Ct. Rep., 334). Indeed, in this

very resolution, the words are used in the larger sense. Thus, the proviso is, 'provided that all lands hereby granted to said company which shall not be sold or disposed of * * * at the expiration of five years, after the completion of the entire road, shall be subject to settlement and pre-emption, like all other lands,' etc. Obviously this refers to all the lands which had passed to the company, whether lands in place or indemnity lands. Further, and in the same clause, appears the same word, 'granted,' in manifestly the same sense, so that in the very resolution the words 'granted lands' or 'lands granted' are used in the larger sense, and it naturally enforces the conviction that they were used in the same broad sense in this clause."

In *Wood vs. Beach*, 156 U. S., 548, the defendant below "entered upon public land within the indemnity limits of a railway grant." The land had then been withdrawn from the market by the Secretary of the Treasury, under instructions from Congress. It was held that, by such entering, the defendant acquired no rights as against the railroad company which eventually selected the land. Judge BREWER, at page 551 said :

"He [defendant below] deliberately took the chances of the railway company's grant being satisfied out of lands within the place limits, or by selections of lands within the indemnity limits other than this, and trusted that in such event this tract would be restored to the public domain and he gain some advantage by reason of being already on the land."

In *Northern Pacific Rd. Co. vs. Barnes*, 2 North Dakota Rep., 310, one of the questions involved was whether the railroad company had such a title to lands

within the indemnity limits of the Northern Pacific Act of July 2d, 1864 (13 Stat. at Large, 356), as would enable it to file a complaint to restrain the sale of such land for taxes. The Court held in the affirmative, and said at page 360 :

“ The indemnity lands are therefore granted equally with the place lands, or lands within the forty-mile limits, by this act. They are of the ‘ amount of twenty sections per mile ’ granted, and the words ‘ thereby and hereby is granted ’ apply to them and pass the title. The only distinction between the two classes of land is the method by which they are identified. Once identified, the company has the same title to the one as to the other. The indemnity provision does not make an additional grant, but simply points out the method by which lands already granted may be identified.”

In *Chicago, etc., Ry. Co. vs. Sioux City, etc., Rd. Co.*, 3 McC., 280, 300, it was said :

“ The lands in place and the indemnity lands were granted by Congress for precisely the same purposes. The intention of the grantor with respect to them was exactly the same. Both were subject to the same trusts. The mode of making the title of the trustee specific was different. * * * ”

In his decision of the *Chicago, St. Paul, Minneapolis and Omaha Ry. Co.* case, 9 L. D., 465-468, rendered on October 7th, 1889, Secretary Noble, in construing the meaning of the phrases “ *land hereby granted*,” “ *embraced in the grant of lands*,” and like phrases, as used in the congressional acts granting railroad lands, made the following interesting review :

“ But it is urged that by the use of the expression ‘ *grant of lands*,’ Congress meant really

granted lands, or lands within the primary limits of the grant. I cannot concur in this view. The history of the legislation of Congress will doubtless show many instances wherein *indemnity*, and land other than place lands, are referred to as *granted* lands. One or two instances suggest themselves to me, and may be briefly referred to. By the 9th section of the Texas Pacific act (16 St., 576), it is provided that if, in the too near approach of said railroad to the Mexican border, the number of sections to which the company is entitled cannot be selected on the line of the road, then a like quantity of land may be selected elsewhere; 'provided that no public lands are *hereby granted* within the State of California further than twenty miles on each side of said road, except to make up deficiencies as aforesaid.' Here *indemnity lands* to be selected for other lost indemnity lands are included in the category of lands '*hereby granted*.'

"Also in the case of the Burlington and Missouri River grant, the only one of quantity without lateral limits now recalled, and where the land is to be obtained by *selection* anywhere along the line of the road, the language of the act is, that (Sec. 19, Act July 2, 1864, 13 St., 356), 'there be and hereby is *granted*,' provided the company accept '*this grant*' within one year, when the Secretary 'shall *withdraw* the lands embraced in *this grant* from market.' And the Supreme Court in 98 U. S., 334, construing the Act, speak of it all the way through as a '*grant*,' and of the lands as '*granted lands*,' and uphold the right of the company to select them anywhere along the general direction of the road, within lines perpendicular to it at each end. * * *

"So in 24 Fed. Rep., page 892, *Barney vs. Winona*, it was held that the expression 'lands which may have been *granted* to the Territory or State

of Minnesota,' includes *all lands* the title to which had passed to the Territory or State of Minnesota, whether these lands were lands in place or *indemnity lands*, and the word *granted* has the broad, rather than the narrow, significance.

"So in the *St. Paul vs. Winona Railroad*, 112 U. S., 730, referring to the significant fact that both acts there quoted speak of additional sections 'to be *selected*, a word wholly inapplicable to lands in place,' the Court says, 'we think, therefore, that these *additional lands granted* to the appellant * * * are lands to be selected.'

"These citations, doubtless, might be multiplied largely, but they are sufficient inasmuch as they show that the expressions '*lands granted*,' '*granted lands*,' '*lands within the grant*,' and similar expressions, have not such narrow and technical meaning as to restrict the use of them to lands in place, or within the primary limits of a grant. On the contrary, such expressions are to be construed liberally and broadly, not standing alone, but in connection with the whole context of the act, and its true meaning gathered therefrom. Therefore, on a full consideration of the subject, I am of the opinion that when Congress spoke of the failure of the Commissioner of the General Land Office to 'have the lands withdrawn from market embraced in the grant of lands,' etc., it meant the lands in both the primary and indemnity limits."

(d.)

Before submitting this case it would seem to be not improper to call the attention of the Court to the second paragraph of the 23d Rule of this Court, which is as follows :

"In all cases where a writ of error shall delay the proceedings on the judgment of the inferior

court, and shall appear to have been sued out merely for delay, damages at a rate not exceeding 10 per cent., in addition to interest, shall be awarded upon the amount of the judgment."

An examination of the record shows the case to be one of simple contract decided by the State Court in accordance with a line of decisions covering more than a century. No Federal question was presented to the State Court and none was considered or decided by it, and under all the circumstances it seems to be clear that the writ of error was "sued out merely for delay" (*West Wisconsin Railway Co. vs. Foley*, 94 U. S., 100; *Whitney vs. Cook*, 99 U. S., 607).

POINT IV.

The writ of error should be dismissed or the judgment of the Court below should be affirmed with costs.

WILLIAM F. HERRIN,
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Of Counsel for Defendant in Error.

N^o. 144.

Sup^r. Ct. of Herrin & Evarts for D. & C.

OFFICE SUPREME COURT U. S.
FILED
FEB 18 1899

Supreme Court of the United States.

OCTOBER TERM, 1898.

Filed Feb. 18, 1899.
No. 144.

DARWIN C. ALLEN,

Plaintiff in Error.

against

THE SOUTHERN PACIFIC RAILROAD
COMPANY,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF CALIFORNIA.

Supplemental Brief of Defendant in Error.

WM. F. HERRIN,

MAXWELL EVARTS,

Of Counsel for Defendant in Error.

Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 144.

DARWIN C. ALLEN,
Plaintiff in Error,

AGAINST

THE SOUTHERN PACIFIC RAILROAD
COMPANY,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF CALIFORNIA.

SUPPLEMENTAL BRIEF OF DEFEND- ANT IN ERROR.

First.

A.

The important question raised upon the reply brief of the plaintiff in error is as to the time within which a writ of error from this Court to the highest Court of a State must be sued out. Our position is that the writ of error must be brought within one year after the entry of the judgment sought to be reviewed. The other side contend that the limitation of time is two

years. The answer to the question will have to be found in the Judiciary Act of March 3d, 1891 (Suppl. to U. S. Rev. Stat., p. 901).

The last paragraph of Section 6 of the Judiciary Act is as follows :

“ But no such appeal shall be taken or writ of error sued out unless within one year after the entry of the order, judgment or decree sought to be reviewed.”

It is said that this limitation of one year applies only to the judgments and decrees mentioned in the section of which it is the last paragraph, and that it does not relate to appeals from or writs of error to the Circuit and District Courts in the cases referred to in Section 5 of the act. If it should be held that the period of one year covers all cases brought to this Court, whether under Section 5 or Section 6 of the Judiciary Act, then, as we understand it, our contention that the writ of error in this case was brought too late will not be questioned.

It is perhaps important to notice that in the Supplement of the Revised Statutes this paragraph is printed separately and is not made a part of the paragraph of the section relating to cases coming from the Circuit Court of Appeals to this Court. This tends to show that the limitation was not to apply only to the 6th section of the act, but was to cover cases brought to this Court under the 5th section, and that the words “ no such appeal shall be taken or writ of error sued out ” referred to *all* the writs of error and appeals to this Court provided for by the act.

It is difficult to see any reason or purpose for having two statutes of limitations covering appeals to and writs of error from this Court. Certainly such a thing never was heard of before. The tendency of modern legislation is to simplify and make easy the procedure and practice in all litigation, and it would surely be a

step backward to now make two periods of time within which appeals to this Court shall be taken, one of one year and the other of two years. The purpose of Section 1003 of the United States Revised Statutes requiring writs of error to State Courts to be brought within the time prescribed for writs of error to Federal Courts was passed for the very purpose of having the time for bringing cases to this Court the same, no matter where the cases came from. To now say that the Judiciary Act of 1891 required some cases to be brought to this Court in one year and other cases in two years is certainly a new departure and not one to be encouraged unless the intention of the act to so declare is unmistakable. The confusion which would result therefrom is evident, and any construction of the statute which would obviate this difficulty is certainly to be desired.

In support of our view that the words "no such appeal" in the limitation paragraph of one year at the end of Section 6 of the Judiciary Act apply to all the appeals to this Court from the lower Federal Courts we desire to call to the attention of the Court Section 4 of the act, which expressly says that appeals to this Court from the District and Circuit Courts shall *only* be had "according to the provisions of this act regulating the same." This section is as follows :

"But all appeals by writ of error or otherwise from said District Courts shall *only* be subject to review in the Supreme Court of the United States, * * * as is hereinafter provided, and the review by appeal, by writ of error, or otherwise, from the existing Circuit Courts, shall be had *only* in the Supreme Court of the United States * * * according to the provisions of this act regulating the same."

It is to be noticed that the act is particular to say that the regulation of appeals from the lower Federal

Courts to this Court is to be found "only" in this act. In other words, the whole scheme of the appellate jurisdiction of cases in the Federal Courts was changed by this act and a new plan substituted therefor, and all the rules and regulations which controlled it in the past were abolished and displaced by the provisions of the new act.

Such was manifestly the intention of the framers of this act, and such purpose was, we take it, clearly expressed by them in the 4th Section thereof. It is now claimed that this purpose must be defeated and that the old rules as to the review in this Court of judgments of the district and circuit courts must prevail. This contention is sought to be supported by requiring this Court to put a most narrow construction upon the words "such appeal" at the end of the 6th Section of the act. Narrow, even if it were not for the words of the 4th Section, and in view of the 4th Section clearly not the meaning which Congress intended to give thereto.

Further than this the general plan of the judiciary act was to shorten the time to take appeals. An appeal to the Circuit Court of Appeals from the final judgment of a District or Circuit Court must be taken in six months, a shorter time for an appeal from a final judgment than ever before provided. It could never have been intended that the time for an appeal from a final judgment of such lower courts direct to the Supreme Court should be four times as long. It could hardly have been meant by Congress that when a case had been dismissed in a District Court for want of jurisdiction, the party aggrieved should have two years in which to decide whether to appeal or not to this Court, the question of jurisdiction being the only question to be certified to this Court for decision. As we read the act it is plain that its framers never supposed they were making one limitation of six months for appeals to the Circuit Court of Appeals, another limitation of one year for appeals to this Court from the Circuit

Court of Appeals, and another limitation of two years for appeals to this Court from the District and Circuit Courts, but they very evidently intended that there should be one period of time covering all appeals to the Circuit Court of Appeals, and another period of time covering all appeals to this Court from any lower Federal Court.

We therefore submit that the words "such appeal shall be taken or writ of error sued out" refer to and were clearly intended by the framers of the act to refer to all the appeals and writs of error to this Court in the cases created by and mentioned in the Judiciary Act of 1891. Most of the appellate jurisdiction of this Court created by Section 5 of the act is new, and we can see no substantial objection to our view that the words "such appeal" are to be construed broadly and refer to all appeals to this Court whether they come under Section 5 or Section 6 of the act. Instead of putting in the limitation of one year in each section and so repeating it, it was inserted after all the appeals to this Court had been referred to, with the intention of including them all, and it is not plain how any other conclusion can be reached in view of Section 4 of the Court of Appeals Act.

b.

Even if it should be held that the limitation of one year applied only to appeals to this Court from judgments of the Circuit Court of Appeals, it is difficult to see how this in any way aids the plaintiff in error. His writ of error is still too late.

Section 1003 of the United States Revised Statutes enacts that writs of error to a State Court must be issued under the same regulations as if the judgment sought to be reviewed had been rendered in a Court of the United States. The text of the section is as follows :

"Writs of error from the Supreme Court to a State Court in cases authorized by law shall be

issued in the same manner and under the same regulations and shall have the same effect as if the judgment or decree complained of had been rendered or passed in a Court of the United States."

We are, therefore, in the position of having two sets of regulations as to writs of error to judgments of the Federal Courts and the question is which of these two sets of regulations is to control the issuing of the writ of error to the State Court.

It would seem clear that the regulation in the case in the Federal Court, which most nearly approached the case in the State Court, would be the one to control. That is to say, the final judgment in the Federal trial Court must be reviewed in two years, but the judgment in a case which has been reviewed by one appellate court must be reviewed in one year. The case in the highest court of a State has, of course, been reviewed once or oftener on appeal, and the time within which the writ of error to such State Court must be sued out should follow the time provided for the review of the judgment in a Federal Court in a case which has been before an appellate tribunal, rather than the rule in regard to an appeal from the judgment of a Federal trial Court. In other words, a case decided by the highest court of a State is substantially in the position of a case decided by the Federal Circuit Court of Appeals and should, therefore, be governed in the procedure bringing it to this Court by the rules relating to writs of error from this Court to the Circuit Court of Appeals.

Second.

We do not know that anything needs to be added to what is contained in our original brief upon the supposed Federal question contained in this case.

The trial Court expressly found that plaintiff owned the land in question (Rec., p. 12), and there is no evidence in the record upon which this finding is based. The Court, however, makes the additional finding:

"That the loss to plaintiff of odd-numbered sections within said granted limits—i. e., within twenty miles of said railroad—because of the various exceptions and reservations in said act provided for, is fully equal to all the odd-numbered sections within said indemnity belt" (Rec., pp. 11 and 12).

This finding having been made, it follows under the decision in *St. Paul and Pacific Railroad Company vs. Northern Pacific Railroad Company*, 139 U. S., 1, that the question of title of the defendant in error to the lands was unaffected by any act on the part of the Secretary of the Interior. (This whole question is discussed at pages 28 to 30 of our original brief.)

At page 7 of his reply brief the plaintiff in error says that the restoration of the lands to the public domain by the order of the Secretary of the Interior was "a final determination, within the terms and intendments of the contracts, that patents for those lands would not issue to that company."

The order of the Secretary of the Interior referred to was dated August 15, 1887 (Rec., p. 12), and the contracts in suit were dated in February, 1888. To say that such an order, made before the contract was entered into, was a final determination under the contract that patents would not issue for the land is too absurd and insincere to require further answer.

The question of whether indemnity lands, as well as place lands, are granted by the Pacific Railroad Acts

is fully discussed at pages 49 to 53 of our original brief.

We do not see that any answer is made in the reply brief of plaintiff in error to the point upon our original brief that the "title, right, privilege or immunity" of plaintiff in error was not specially set up or claimed by him, in the State Court.

WM. F. HERRIN,
MAXWELL EVARTS,
Of Counsel for Defendant in Error.

Statement of the Case.

THIS suit, commenced by the Southern Pacific Railroad Company, (the defendant in error here,) against Darwin C. Allen, who is plaintiff in error, was based on eighty-four written contracts entered into on the first day of February, 1888. All these contracts were made exhibits to the complaint and were exactly alike, except that each contained a description of the particular piece of land to which it related. By the contracts the Southern Pacific Company agreed to sell and Darwin C. Allen to buy the land described in each contract upon the following conditions: Allen paid in cash a stipulated portion of the purchase price and interest at seven per cent in advance for one year on the remainder. He agreed to pay the balance in five years from the date of the contracts. The deferred payment bore interest at seven per centum per annum, which was to be paid at the end of each year. He moreover bound himself to pay any taxes or assessments which might be levied on the property. The contracts provided:

"It is further agreed that upon the punctual payment of said purchase money, interest, taxes and assessments, and the strict and faithful performance by the party of the second part, [Allen, the purchaser,] his lawful representatives or assigns, of all the agreements herein contained, the party of the first part [the Southern Pacific Company] will, after the receipt of a patent therefor from the United States, upon demand and the surrender of this instrument, execute and deliver to the party of the second part, his heirs and assigns, a grant, bargain and sale deed of said premises, reserving all claim of the United States to the same as mineral land."

There was a stipulation that the purchaser should have a right to enter into possession of the land at once, and by which he bound himself until the final deed was executed not to injure the property by denuding it of its timber. The contracts contained the following:

"The party of the first part [the Southern Pacific Company] claims all the tracts hereinbefore described, as part of a grant of lands to it by the Congress of the United States; that patent has not yet issued to it for said tracts; that it will

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use ordinary diligence to procure patents for them; that, as in consequence of circumstances beyond its control, it sometimes fails to obtain patent for lands that seem to be legally a portion of its said grant, therefore nothing in this instrument shall be considered a guarantee or assurance that patent or title will be procured; that in case it be finally determined that patent shall not issue to said party of the first part for all, or any of the tracts herein described, it will, upon demand, repay [without interest] to the party of the second part all moneys that may have been paid to it by him on account of any of such tracts as it shall fail to procure patent for, the amount of repayment to be calculated at the rate and price per acre, fixed at this date for such tracts by said party of the first part, as per schedule on page 3 hereof; that said lands being unpatented, the party of the first part does not guarantee the possession of them to the party of the second part, and will not be responsible to him for damages, or costs, in case of his failure to obtain and keep such possession."

It was averred that after the execution of the contracts Allen, the purchaser, had entered into possession of the various tracts of land, and so continued up to the time of the commencement of the suit. The amount claimed was three annual instalments of interest on the deferred price which it was alleged had become due in February, 1889, 1890 and 1891. The prayer of the complaint was that the defendant be condemned to pay the amount of these respective instalments within thirty days from the date of decree, and in the event of his failure to do so that himself, his representatives and assigns, "be forever barred and foreclosed of all claim, right or interest in said lands and premises under and by virtue of said agreements, and be forever barred and foreclosed of all right to conveyance thereof, and that said contracts be declared null and void."

The defendant, whilst admitting the execution of the contracts, denied that he had ever taken possession of any of the land, and charged that the contracts were void because at the time they were entered into and up to the time of the institution of the suit the seller had no ownership or interest of any

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kind in the land, and therefore that no obligation resulted to the buyer from the contracts. By way of cross-complaint it was alleged that the defendant had been induced to enter into the contracts by the false and fraudulent representations of the complainant that it had a title to or interest in the property; that, in consequence of the error of fact produced by these misrepresentations of the plaintiff, the defendant had paid the cash portion of the price and the interest in advance for one year on the deferred instalment; that, owing to the want of all title to or interest in the land on the part of the complainant, the defendant had been unable to take possession thereof, and that some time after the contracts were entered into the defendant had an opportunity to sell the land for a large advance over the amount which he had agreed to pay for it, which opportunity was lost in consequence of the discovery of the fact that the complainant had no title whatever to the property. The prayer of the cross-complaint was that the moneyed demand of the plaintiff be rejected; that the contracts be rescinded, and that there be a judgment against the plaintiff for the amount paid on account of the purchase price and for the damage which the defendant had suffered by reason of his failure to sell the property at an advanced price. The complainant put the cross-complaint at issue by denying that it had made any representations as to its title to or interest in the land except as stated in the contracts. It denied that at the time of the contracts it had no interest in the land, or that the defendant had been prevented from taking possession or had been prevented from selling at an advanced price because of a want of title.

Upon these issues the case was heard by the trial court, which made a specific finding of fact embracing, among other matters, the following: That the contracts sued on had been entered into as alleged and the instalments claimed thereunder were due despite demand; that no representations had been made by the plaintiff as to its title other than those which were recited in the contract; that the defendant had not lost the opportunity to sell at an advanced price, as alleged in the cross-complaint.

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As to the title to the land embraced in the contracts, the facts were found to be as follows:

"That the lands and premises therein described were portions of the public domain of the United States and were granted to plaintiff by an act of the Congress of the United States, entitled 'An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast,' approved July 27, 1866. That all of said lands, save sec. 5, in township 23 south, range 19 east, M. D. M., are situated within a belt more than 20 miles and less than 30 miles from plaintiff's railroad, generally known as the indemnity belt; the said sec. 5 being within 20 miles of said railroad.

"That the loss to plaintiff of odd-numbered sections within said granted limits, *i.e.*, within 20 miles of said railroad, because of the various exceptions and reservations in said act provided for, is fully equal to all the odd-numbered sections within said indemnity belt.

"That on March 19, 1867, an order was made by the Secretary of the Interior of the United States withdrawing or purporting to withdraw from sale or settlement under the laws of the United States, all of said lands situated in said indemnity belt; and that on August 15, 1887, another order was made by said Secretary of the Interior, revoking, or purporting to revoke, said first named order, and restoring said lands to the public domain for the usual sale and settlement thereof. The first said order of withdrawal is set forth in vol. — of 'Decisions of the Secretary of the Interior' at p. —, and the said second order in vol. 6 of said 'Decisions' at pp. 84-92; and which said orders as so set forth are here referred to, and made a part of this finding. That plaintiff is the owner of said lands in fee under the provisions of said act of Congress; that patents or a patent therefor have not yet been issued to plaintiff by the Government of the United States; that it has not been finally determined that patents or a patent shall not issue therefor, or for any part thereof, but proceedings are now pending before the proper Department of the Government of the United States, instituted by plaintiff, to obtain patents or

**ALLEN v. SOUTHERN PACIFIC RAILROAD COM-
PANY**

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 144. Argued January 17, 1899. — Decided April 8, 1899.

The sixth section of the act of March 3, 1891, c. 517, did not change the limit of two years as regards cases which could be taken from Circuit and District Courts of the United States to this court, and that act did not operate to reduce the time in which writs of error could issue from this court to state courts.

As a reference to the opinion of the Supreme Court of California makes patent the fact that that court rested its decision solely upon the construction of the contract between the parties to this action which forms its subject, and decided the case wholly independent of the Federal questions now set up; and as the decree of the court below was adequately sustained by such independent, non-Federal question, it follows that no issue is presented on the record which this court has power to review.

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a patent for said lands and premises, and the whole thereof. That plaintiff has not been guilty of any want of ordinary diligence in instituting or prosecuting said proceedings to obtain said patents or patent."

There was a decree allowing the prayer of the complaint and rejecting that of the cross-complaint. On appeal the case was first heard in Department No. 1 of the Supreme Court of California, and the decree of the trial court was in part reversed. In accordance with the California practice the cause was transferred from the court in department to the court in banc, where the decree of the trial court was affirmed. 112 California, 455. To this decree of affirmance this writ of error is prosecuted.

Mr. Wilbur F. Zeigler for plaintiff in error. *Mr. Edward R. Taylor* filed briefs for same.

Mr. Maxwell Evarts for defendant in error. *Mr. William F. Herrin* was on his brief.

MR. JUSTICE WHITE, after making the foregoing statement, delivered the opinion of the court.

It is asserted that the record is not legally in this court because the writ of error was allowed by the Chief Justice of the State after the expiration of the time when it could have been lawfully granted. It was allowed within two years of the decree by the state court, but after more than one year had expired. The contention is that writs of error from this court to the courts of the several States cannot now be lawfully taken after the lapse of one year from the final entry of the decree or judgment to which the writ of error is directed.

This rests on the assumption that the act of March 3, 1891, c. 517, 26 Stat. 826, not only provides that writs of error or appeals in cases taken to the Supreme Court from the Circuit Courts of Appeals created by the act of 1891, shall be limited to one year, but also fixes the same limit of time for writs of error or appeal in cases taken to the Supreme Court from the

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Circuit and District Courts of the United States, thereby repealing the two years' limitation as to such Circuit and District Courts previously established by law. Rev. Stat. § 1008. As this asserted operation of the act of 1891 produces a uniform limit of one year for writs of error or appeals as to all the courts of the United States, in so far as review in the Supreme Court is concerned, the deduction is made that a like limit necessarily applies to writs of error from the Supreme Court to state courts, since such state courts are, Rev. Stat. § 1003, subject to the limitation governing judgments or decrees of "a court of the United States." The portion of the act of 1891 from which it is claimed the one year limitation as to writs of error and appeal from the Supreme Court to all courts of the United States arises is the last paragraph of section 6 of that act. The section of the act in question in the portions which precede the sentences relied upon, among other things, defines the jurisdiction of the Circuit Courts of Appeals established by the act of 1891, and determines in what classes of cases the jurisdiction of such courts is to be final. After making these provisions the concluding part of section 6 provides as follows:

"In all cases not hereinbefore, in this section, made final, there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs. But no such appeal shall be taken or writ of error sued out unless within one year after the entry of the order, judgment or decree sought to be reviewed."

It is apparent that the language just quoted relates exclusively to writs of error or appeal in cases taken to the Supreme Court from the Circuit Courts of Appeals. The statute, in the section in question, having dealt with the jurisdiction of the Circuit Courts of Appeals and defined in what classes of cases their judgments or decrees should be final and not subject to review, follows these provisions by conferring on the Supreme Court the power to review the judgments or decrees of the Circuit Courts of Appeals, not made final by the act. To construe the section as relating to or controlling the review by

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error or appeal, by the Supreme Court, of the judgments or decrees of Circuit or District Courts of the United States, would not only disregard its plain letter but do violence to its obvious intent. Relating only, then, to writs of error or appeal from the Supreme Court to the Circuit Courts of Appeals, it follows that the limitation of time, as to appeals or writs of error, found in the concluding sentence, refers only to the writs of error or appeal dealt with by the section and not to such remedies when applied to the District or Circuit Courts of the United States, which are not referred to in the section in question. This is made manifest by the statement, not that all appeals or writs of error to the Supreme Court from all the courts of the United States shall be taken in one year, but that "no such appeal shall be taken unless within one year," etc. If these words of limitation were an independent and separate provision of the act of 1891, thereby giving rise to the implication that the words "no such appeal or writ of error" qualified and limited every such proceeding anywhere referred to in the act of 1891, the contention advanced would have more apparent force. As, however, this is not the case, and as, on the contrary, the words "no such appeal or writ of error" are clearly but a portion of section 6, it would be an act of the broadest judicial legislation to sever them from their connection in the act in order to give them a scope and significance which their plain import refutes, and which would be in conflict with the meaning naturally begotten by the provision of the act with which the limitation as to time is associated. Nor is there anything in section 4 of the act of 1891, destroying the plain meaning of the words "such appeal or writ of error," found in the concluding sentence of section 6. The language of section 4 is as follows:

"All appeals by writ of error or otherwise, from said District Courts, shall only be subject to review in the Supreme Court of the United States or in the Circuit Court of Appeals hereby established, as is hereinafter provided, and the review, by appeal, by writ of error or otherwise, from the existing Circuit Courts shall be had only in the Supreme Court of the United States or in the Circuit Courts of Appeals hereby es-

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tablished according to the provisions of this act regulating the same."

This section refers to the jurisdiction of the courts created by the act of 1891, and to the changes in the distribution of judicial power made necessary thereby. If the concluding words of section 4, "according to the provisions of this act regulating the same," were held to govern the time for writs of error or appeal to the Supreme Court from the District or Circuit Courts of the United States, the argument would not be strengthened, since there is no provision in the act governing the time for such writs of error or appeal. The contention that Congress cannot be supposed to have intended to fix two distinct and different limitations for review by the Supreme Court, one of two years as to the Circuit and District Courts of the United States, and the other of one year as to the Circuit Courts of Appeals, affords no ground for disregarding the statute as enacted, and departing from its unambiguous provisions upon the theory of a presumed intent of Congress. Indeed, if it were conceded that the provisions of section 4 referred to the procedure or limit of time in which appeals or writs of error could be taken, in cases brought to the Supreme Court, from the Circuit or District Courts of the United States, such concession would be fatal to the contention which we are considering, for this reason. The concluding portion of section 5 of the act of 1891 is as follows:

"Nothing in this act shall affect the jurisdiction of the Supreme Court in cases appealed from the highest court of a State, nor the construction of the statute providing for review of such cases."

Whilst this language clearly relates to jurisdictional power and not to the mere time in which writs of error may be taken, yet the same reasoning which would impel the concession that section 4 related to procedure and not to jurisdictional authority would give rise to a like conclusion as to the provision in section 5 just quoted. It follows, therefore, that the only reasoning by which it is possible to conclude that the act of 1891 was intended to change the limit of time in which writs of error could issue from the Supreme Court to the Cir-

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cuit or District Courts, or in which appeals could be taken from such courts to the Supreme Court, would compel to the conclusion that the act of 1891 had expressly preserved the two years' limitation of time then existing as to writs of error from state courts to the Supreme Court.

From the conclusion that the sixth section of the act of 1891 did not change the limit of two years as regards the cases which could be taken from the Circuit and District Courts of the United States to the Supreme Court, it follows that the act of 1891 did not operate to reduce the time in which writs of error could issue from the Supreme Court to the state courts. That period was two years, in analogy to the time limit established by statute with reference to writs of error to the District and Circuit Courts of the United States, which courts, at the time of the passage of the act of 1891, answered to the designation of "a court of the United States" contained in section 1003 of the Revised Statutes, regulating the subject of writs of error to state courts. The circumstance that Congress, in creating a new court of the United States, affixed a different limitation as to the time for prosecuting error to such court and left unchanged the limitation as to the time within which error might be prosecuted to the courts whose practice in this particular governed the practice in state courts, irresistibly warrants the inference that it was intended that the practice in the state courts as to the time of suing out writs of error should continue unaltered. The writ of error in this case having been allowed within two years from the final decree, was therefore seasonably taken.

We are brought, then, to consider whether there arises on the record a Federal question, within the intendment of Rev. Stat. § 709. The claim is that two distinct Federal issues are presented by the record or are necessarily involved therein. They are: First. That by a proper construction of the act of Congress granting land to the railroad, 14 Stat. 292, no title to lands which were beyond the place limits, but in the indemnity limits, passed to the railroad until approved selections of such lands had taken place, hence that it was not only drawing in question the validity of an authority exercised

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under the United States, but also denying a privilege or immunity claimed under the statute of the United States to decide that the railroad had, before such approved selection, any right to contract to sell the lands in question. Second. That it was drawing in question the validity of an authority exercised under a law of the United States, and denying a privilege or immunity claimed under such law to hold that the right of the railroad to the lands in question had not been irrecoverably adversely determined by the action of the Secretary of the Interior, revoking his previous action withdrawing such lands, even although, at the time of such cancellation of the prior general withdrawal, there were pending in the Land Department claims of the railroad to the land in question which at that time were not finally disposed of.

Conceding *arguendo* only that the contentions thus advanced would give rise to the Federal questions as claimed, it becomes wholly unnecessary to consider them if it be disclosed by the record that the state court rested its decision upon grounds wholly independent of these contentions, and which grounds are entirely adequate to sustain the judgment rendered by the state court without considering the Federal questions asserted to arise on the record. *McQuade v. Trenton*, 172 U. S. 636; *Capital Bank v. Cadiz Bank*, 172 U. S. 425.

In inquiring whether this is the case we are unconcerned with the conclusions of the trial court, or with those of a department of the Supreme Court of California, and consider only the final action of the Supreme Court of the State in disposing of the controversy now before us. A reference to the opinion of the Supreme Court of California makes patent the fact that that court rested its decision solely upon a construction of the contract, and therefore that it decided the case upon grounds wholly independent of the Federal questions now claimed to be involved. The court held that the contract disclosed that both parties dealt with reference to the existing state of the title to the lands, the vendor selling his hope of obtaining title and the vendee buying such expectation; that the result of the contract was that the vendor in advance agreed to sell such title, if any, as he might obtain

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in the future, and that the vendee agreed for the sake of obtaining in advance the right to the title, if the vendor could procure it, to pay the amount agreed upon, subject to the return of the price in the event it should be finally determined that the hope of title in the vendor, as to which both parties were fully informed, should prove to be illusory. On these subjects the court said :

"The defendant further contends that the contracts were void *ab initio*, for want of mutuality or consideration, or amounted at most to mere offers to purchase on his part. This contention cannot be sustained. Plaintiff claimed title to these lands, but its title had not been perfected by patent. Defendant had the same opportunity as plaintiff of knowing the nature and probable validity of that claim. Under these circumstances plaintiff agreed to convey to defendant when it should obtain a patent, and to permit defendant to enter into possession of the land at once. In consideration of these premises defendant agreed to purchase when a patent should be issued, paid at once one fifth of the purchase price and one year's interest on the balance, and agreed to pay the remainder (with interest thereon annually in advance) on or before a given date, with the right to a repayment without interest in the event of an ultimate failure to obtain a patent. These promises were strictly mutual, and each constituted a sufficient consideration for the other. Plaintiff by its contract surrendered its right to contract with or sell to any one else, and yielded to defendant the present right to possession which it claimed. These concessions were clearly a detriment to plaintiff, and, in a legal sense, an advantage to defendant; and they, therefore, furnish a consideration for defendant's promise to pay."

Upon the question of the final determination of the hope of title upon which the return of the price was by the contract made to depend, the court concluded as follows :

"The only question really involved in the case is as to the construction of the contracts sued upon. It is contended by the defendant that he was under no obligation to purchase the land or to pay the remainder of the purchase price, unless the

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plaintiff should, *within the five years*, obtain a patent for the land; and that, as the plaintiff had failed to obtain a patent within that time, and as the action was not tried until after the expiration of that time, the defendant was entitled to a rescission of the contract. But clearly the contracts will not bear any such construction. The defendant contracted unconditionally to pay the remainder of the purchase price 'on or before' a certain day named, and to pay interest annually in advance on the remainder; but the plaintiff contracted to convey to defendant only 'upon the receipt of a patent,' and was to repay the money only 'in case it be *finally determined* that patent shall not issue.' The defendant, therefore, was not entitled to terminate the contract or to require a repayment of the moneys paid, until the question of the issue of a patent to the plaintiff should be 'finally determined.' The findings state that proceedings are now pending in the United States Land Department for the issue of patent to the plaintiff, and that it has not been finally determined that such patent shall not issue. At the time, therefore, at which defendant contracted to pay the balance of the purchase price, plaintiff was not in default, nor was it in default at the time of the trial."

We cannot say that the state court has erroneously construed the act of Congress, since its decree rests alone upon the conclusion reached by it, that by the contracts between the parties there existed a right to recover whatever may have been the existing state of the title. The conclusion that the parties were competent to contract with reference to an expectancy of title involved no Federal question. The decision that the final determination of title, referred to in the contracts, related to the proceedings in the Land Department which were pending at the time the contracts were entered into and not to the cancellation by the Secretary of the Interior of the withdrawal order, which had been made by that officer before the date of the contracts, precludes the conception that the state court erroneously denied the legal consequence flowing from the order of withdrawal. It follows then that as the decree of the court below was adequately

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sustained by an independent non-Federal question, there is no issue presented on the record which we have the power to review, and the cause is therefore

Dismissed for want of jurisdiction.